Supreme Court, U. S.
FILED
MAR 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
Appellant,

versus

HUGH B. COTTRELL, M.D., HEALTH OFFICER,
STATE OF MISSISSIPPI,
Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi, Jackson Division

JURISDICTIONAL STATEMENT

SAMUEL LANG
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160

COUNSEL FOR APPELLANT
THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.

INDEX

Page

TABLE OF AUTHORITIES

Cases ii

Statutes iii

JURISDICTIONAL STATEMENT

I. Opinions Below 2

II. Jurisdiction 3

III. State Regulation Involved 3

IV. Questions Presented 4

V. Statement of the Case 5

VI. The Questions Presented are Substantial 7

Must the burden on interstate commerce which Section 11 imposes be tolerated? 7

Does Mississippi's decision to reject A&P's milk while accepting milk from other Louisiana processors violate the guarantee of equal protection of the laws? 12

VII. Conclusion 13

CERTIFICATE OF SERVICE 15

APPENDICES

A. Opinion of Single-Judge Court 1a

B. Designation of Three-Judge Court 7a

INDEX (Continued)

		Page
C.	Opinion of Three-Judge Court	8a
D.	Judgment of Three-Judge Court	24a
E.	Notice of Appeal	26a
F.	Mr. Justice Powell's Order Extending Date for Docketing Appeal	29a

TABLE OF AUTHORITIES

Cases:

Bailey v. Patterson, 369 U.S. 31 (1962) 6

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1934) 8

California v. Thompson, 313 U.S. 108 (1941) 7

Dean Milk Company v. City of Madison, Wisconsin, 340 U.S. 349 (1951) 8

Hood & Sons v. DuMond, 336 U.S. 525 (1949) 8

Huron Portland Cement Co. v. Detroit, 362 U.S. 400 (1960) 10

McGowan v. Maryland, 366 U.S. 420 (1961) 11

Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939) 7

Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) 7,10

Portland Cement Co. v. Minnesota, 358 U.S. 450 (1960) 10

Shapiro v. Thompson, 394 U.S. 618 (1969) 12

TABLE OF AUTHORITIES (Continued)

Page

Statutes:

28 U.S.C. §1253 3

28 U.S.C. §1331 3

28 U.S.C. §2201 3

28 U.S.C. §2281 3,7

Section 4560-14, Mississippi Code of 1942, as amended 3

"Regulation Governing The Production And Sale Of Milk And Milk Products," Section 11 ..... passim

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
Appellant,

versus

HUGH B. COTTRELL, M.D., HEALTH OFFICER,
STATE OF MISSISSIPPI,
Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi, Jackson Division

JURISDICTIONAL STATEMENT

The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A&P), the Appellant herein, filed this action for a declaratory judgment and temporary and permanent injunctive relief against Hugh B. Cottrell, M.D., Health Officer, State of Mississippi (hereinafter referred to as Mississippi), the Appellee herein. A&P alleges that Section 11 of the Mississippi State Board of Health's "Regulation Governing The Production And Sale Of Milk And Milk Products" (hereinafter referred to as Section 11), denies admis-

sion to the State of Mississippi to milk from states which have not entered into a reciprocity agreement with Mississippi. That agreement does not advance and is totally unrelated to health and sanitary considerations. Therefore, by insistence on such a requirement, Mississippi has imposed an unconstitutional burden on interstate commerce. Suit was brought before a single judge who denied A&P's request for a preliminary injunction and held that only a three-judge court had jurisdiction of the complaint. A&P further contended that it was denied equal protection of the law because other Louisiana processors were allowed to export milk to Mississippi despite Louisiana's decision not to sign a reciprocity agreement. Evidence of this disparate treatment was provided by one of Mississippi's health officers during the hearing before the single judge.

A three-judge panel was designated which rendered a judgment against A&P and this appeal followed. This Jurisdictional Statement shows that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are substantial.

I. OPINIONS BELOW

The opinions of the United States District Court for the Southern District of Mississippi are unreported. Copies of the opinions and judgment for the one-judge and three-judge courts are contained in the Appendices to this Jurisdictional Statement.

II. JURISDICTION

This suit was brought pursuant to Sections 1331 and 2201 of Title 28 of the United States Code. The three-judge court rendered its opinion on October 28, 1974, denying the requested relief. 28 U.S.C. §2281. Judgment was entered on November 13, 1974, and A&P filed its Notice of Appeal on December 11, 1974. A direct appeal to this Court from the decision of the three-judge court is authorized by 28 U.S.C. §1253.

III. STATE REGULATION INVOLVED

Section 4560-14 of the Mississippi Code of 1942, as amended, authorizes the Mississippi State Board of Health to enact regulations of state-wide force concerning the safety and wholesomeness of milk and milk products sold in the state. Pursuant to that authority, in 1967 the Mississippi State Board of Health enacted Section 11 as follows:

> Section 11. MILK AND MILK PRODUCTS FROM POINTS BEYOND THE LIMITS OF ROUTINE INSPECTION
>
> Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90

percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, *and Provided further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis.* . . . (Regulations Governing the Production and Sale of Milk and Milk Products, Section 11, emphasis added.)

IV. QUESTIONS PRESENTED

May the State of Mississippi, consistent with the Commerce Clause of the United States Constitution, deny A&P the right to export into Mississippi from its Louisiana facility milk fully satisfying Mississippi's health standards solely because the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi? A related question is whether Mississippi enforcement policy, allowing certain Louisiana milk processors to export into Mississippi but denying that right to A&P, unconstitutionally deprives A&P of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

V. STATEMENT OF THE CASE

A&P processes milk and other dairy products at its Kentwood, Louisiana plant for delivery to its retail stores in Louisiana and Mississippi. Much of the raw milk processed at the plant comes from Mississippi producers.

The investment in the Kentwood plant was made specifically in anticipation of exporting processed

milk into A&P's retail stores in Mississippi. A&P's investment in the Kentwood plant exceeds one million dollars and throughout much of these proceedings A&P has suffered actual irreparable losses of up to $2,500.00 per week because of the refusal of Mississippi officials to allow milk from the Kentwood plant into Mississippi.

A&P has complied fully with all health related requirements of the Mississippi Regulation, within the meaning of Section 11. The Kentwood plant received a 100% score on an inspection conducted by the Louisiana Department of Health in 1972 and a 98% score on a 1973 inspection. Nowhere has it been asserted that milk processed at A&P's Kentwood plant fails to meet the health standards imposed on processors in the State of Mississippi or those standards which are imposed on Louisiana processors that currently are distributing milk in Mississippi.

The sole reason milk from the Kentwood plant has not been accepted in Mississippi is that the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi. Mississippi offers to accept imported milk meeting Louisiana standards (but not necessarily meeting Mississippi standards) if Louisiana will reciprocate. But, Section 11 does not stop there. Instead of merely refusing to waive its own standards when Louisiana refuses to do so, Mississippi goes further and totally bans importation of milk from states not having reciprocity agreements *regardless* of the milk's quality. As a result, Louisiana milk is rejected by Mississippi even though it meets (or exceeds) exactly the same standards required of Mississippi milk.

Furthermore, for reasons not explained, Mississippi does accept milk from Louisiana processors such as Borden Co., Franklinton; Borden Co., New Orleans; Sealtest Dairy Products, New Orleans; and Superbrand Dairy Products, New Orleans; which were importing milk into Mississippi prior to the adoption of Section 11 in 1967. These Louisiana processors are allowed to export milk to Mississippi without a reciprocity agreement, *and* without additional inspection to that performed by Louisiana officials.

Appellant filed suit in the United States District Court for the Southern District of Mississippi seeking a judgment declaring Section 11 unconstitutional as violative of the Commerce Clause of the Constitution and requesting an injunction barring Mississippi from enforcing that Section. Proceedings were brought before a single judge because Section 11 appeared to be patently unconstitutional. *Bailey v. Patterson*, 369 U.S. 31 (1962). Thereafter, the Honorable Dan M. Russell, Jr. concluded that consideration of Section 11 must await convention of a three-judge court. Appellant filed an amended complaint praying for a statutory three-judge court which was then constituted by the Chief Judge of the Fifth Circuit Court of Appeals.

The three-judge court denied declaratory and injunctive relief to A&P and sustained the constitutionality of Section 11. Judgment was entered, and A&P filed its Notice of Appeal to the Supreme Court.

VI. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Must the burden on interstate commerce which Section 11 imposes be tolerated?

Despite the lengthy and sometimes tortuous history of this proceeding, the facts are simply put. Mississippi, through its unquestioned police power to do so, has passed a sanitary code which includes a section on the importation of milk into Mississippi. The regulation establishes two requirements: (1) the out-of-state milk must be processed under regulations substantially equivalent to Mississippi's Regulation (which contains detailed health standards), and (2) the exporting state must have signed a reciprocity agreement with the State of Mississippi. The first requirement, which serves to protect the health and safety of Mississippi residents, is constitutional. The second requirement, which conditions the right of A&P to engage in interstate commerce upon some action by Louisiana, is not.

A state may not burden the free flow of interstate commerce. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964). However, a state may, on a non-discriminatory basis, enact reasonable legislation under its police power to protect the health and safety of its citizens even though that legislation incidentally burdens the free flow of interstate commerce. *California v. Thompson*, 313 U.S. 108, 113 (1941); *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939). But the enacting state

must justify this burden on commerce by demonstrating that the legislation is designed to protect the safety, health, or welfare of its citizens. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1934). Protecting the economic welfare of state businessmen from foreign competition or insuring the access of state businessmen to foreign markets under the guise of publishing safety and health measures is not a legitimate exercise of a state's police power. *Dean Milk Company v. City of Madison, Wisconsin*, 340 U.S. 349 (1951); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

Here, the requirement that out-of-state milk be processed under regulations equal or substantially equivalent to the Mississippi health standards is undoubtedly valid. A&P makes no claim that that portion of Section 11 is not. To the contrary, A&P implores Mississippi health officials to determine whether A&P milk meets those standards and, if it does, to allow that milk to be shipped into Mississippi.

Mississippi refuses entrance for the exclusive reason that the State of Louisiana has not agreed to the reciprocity provision that the State of Mississippi demands. The necessary tendency of that provision is either to protect Mississippi's markets for local processors or, open foreign markets for local businessmen should Mississippi admit foreign milk. Upon either basis the requirement is repugnant to the Commerce Clause. *Hood v. DuMond, supra.*

A careful analysis of the actual effect of the Mississippi reciprocity rule demonstrates the artlessness of Mississippi's argument that the rule is intended to insure the wholesomeness of imported milk. The

reciprocity agreement permits Mississippi to *waive* its requirements if Louisiana will waive its standards for imported Mississippi milk. Since Mississippi argues earnestly that its health standards are stricter than those imposed in Louisiana, the result of the reciprocity rule would be to *lower* the standards for imported milk if the exporting state will agree to a political arrangement desired by the State of Mississippi. Any contention that this reciprocity provision, allowing *lower* milk standards, ensures a sanitary supply of milk is frivolous.

On the other hand, if Louisiana's milk is processed under standards more stringent than those in current effect in Mississippi, Mississippi's insistence on a reciprocity agreement (with the consequent right to export milk to Louisiana) and Louisiana's accession would result in less healthful milk for Louisiana citizens. In either case, the regulation creates an overt and substantial obstruction to the free flow of interstate commerce.

Reciprocity may be a laudable goal. Reciprocity, by eliminating hyper-technical standards peculiar to one state, may aid the free flow of milk.[1] But Mississippi

1 Of course, this will not be true in all cases. For example, in this case the effect of the reciprocity clause is to ban all interstate shipments of milk from Louisiana to Mississippi without regard to the quality of that milk.

has no power to make such rules. The Constitution entrusts Congress alone with that power. *Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1960); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 400 (1960).

In defense of the Regulation Mississippi argued that cases have held that a state may extend privileges to citizens of another state only if that state agrees to extend similar privileges to its citizens. That is true, but those cases deal with privileges not constituional rights. While Mississippi may condition privileges on reciprocity, it cannot condition the exercise of constitutional rights (interstate commerce) on the action of some other state. The Commerce Clause of the Consitution demands that Mississippi allow interstate competition on a nondiscriminatory basis. *Polar Ice Cream & Creamery Co. v. Andrews*, *supra*.

It is clearly within the power of the State of Mississippi to condition waiver of its stricter milk health standards for imported milk on the agreement of the exporting state to do likewise. In effect, Mississippi is merely granting the importer the privilege of importing milk that does not meet the Mississippi standards, while meeting its own state's standards, but only if the exporting state will reciprocate. If the exporting state refuses to reciprocate, then Mississippi can refuse to extend this privilege, and insist that the out-of-state milk meet Mississippi's own, stricter standards. But where there is no reciprocity agreement, Mississippi cannot *totally* ban the importation of milk from the uncooperative state even though that milk meets the standards required of Mississippi milk.

Mississippi cannot defend Section 11 by arguing that the Louisiana practice[2] is invalid, and by further arguing that Mississippi will not abide by the Constitution unless Louisiana first agrees to. The Appellant is A&P, not Louisiana. A&P has no control over Louisiana or what regulations that state adopts. A&P brought suit against *Mississippi*, and it is that state which should be enjoined from acting unconstitutionally.

Does Mississippi's decision to reject A&P's milk while accepting milk from other Louisiana processors violate the guarantee of equal protection of the law?

In deciding whether or not a state regulation violates the Equal Protection Clause of the Fourteenth Amendment, a court must select between two standards in testing the regulation under assault. The ordinary test is whether the regulation is rationally suited to achieve a lawful objective of the state. *McGowan v. Maryland*, 366 U.S. 420 (1961). The other and harder test is to be applied only when fundamental liberty is threatened or the state has established what has been termed a "suspect" classification, such as race, in a regulation. Under this latter test, the par-

---

2 Louisiana allows all milk meeting its standards to be sold in the state regardless of its origin and without insistence on requirements unrelated to health.

ticular law must be adjudged more than rationally related to a legitimate state purpose; there must be a compelling state interest to justify it. *Shapiro v. Thompson*, 394 U.S. 618 (1969). Even measured by the more lenient standard, as matters of economic importance usually are, Section 11, as applied, violates the Fourteenth Amendment.

Mississippi allows the importation of milk from at least four Louisiana dairies even though that milk does not meet the Mississippi standards and Louisiana has not signed a reciprocity agreement. Mississippi offers no justification for this anomaly. Reliance upon the fact that those processors were exporting before 1967 has been suggested occasionally as the reason for this discrimination. However, at no time has Mississippi proffered any state legislative act to permit such "grandfather" treatment.

More importantly, no rational basis, associated with protection of a wholesome supply of milk, could be advanced. Louisiana milk, supposedly inferior to Mississippi's milk, is being consumed in Mississippi without that state's inspection. This practice is further evidence that the real aim and exclusive effect of the reciprocity rule is not health; but, rather, is a protectionist scheme for the economic well-being of Mississippi dairy processors.

VII. CONCLUSION

For the foregoing reasons, it is apparent that a substantial judicial question is presented concerning the constitutionality of Section 11. If the decision is allowed to stand it would not only burden, but also would constitute an absolute ban on interstate commerce in milk and milk products between Louisiana (and possibly other states) and Mississippi.

This Court should note probable jurisdiction and grant plenary consideration through briefing and oral argument on the merits. Alternatively, an order should be entered summarily reversing the decision of the court below.

Respectfully submitted

/s/ Samuel Lang

SAMUEL LANG
Kullman, Lang, Inman & Bee,
A Professional Corporation
615 Howard Avenue
Post Office Box 60118
New Orleans, Louisiana 70160
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of March, 1975, by certified mail, return receipt requested, postage prepaid, mailed three copies of the foregoing Jurisdictional Statement to Mr. A. F. Summer, Attorney General, State of Mississippi, New Capitol Building, Jackson, Mississippi and to Mr. Heber A. Ladner, Jr., Suite 1638, Capital Towers, Jackson, Mississippi.

/s/ Samuel Lang

APPENDIX A

United States District Court
Southern District of Mississippi
Jackson Division

THE GREAT ATLANTIC & PACIFIC CO.,
Plaintiff

versus C.A. No. 72J-212(R)

H. B. COTTRELL, M.D., HEALTH OFFICER,
STATE OF MISSISSIPPI,
Defendant

OPINION OF THE COURT

Plaintiff, The Great Atlantic & Pacific Tea Company, Inc., a Maryland Corporation, has brought this action for declaratory and injunctive relief against Hugh B. Cottrell, M.D., Health Officer, State of Mississippi. Jurisdiction is founded on 28 U.S.C.A. #1331 (federal question) and #2201 (declaratory judgment). Plaintiff operates a milk processing plant at Kentwood, Louisiana, and seeks to deliver its processed milk to retail outlets in the State of Mississippi. In order to do so, plaintiff applied to the Mississippi State Board of Health on August 28, 1972, for a permit which it claims has been denied on the sole grounds that the supervisor of the milk control program, a division of the State Board of Health, refuses to approve plaintiff's application until such time as Louisiana executes a reciprocity agreement with Mississippi pursuant to Section 11 of the Regulations

Governing the Production and Sale of Milk and Milk Products in Mississippi.

Under Section 4560-14 of the Mississippi Code of 1942, the State Board of Health is authorized to make such rules and regulations as may be necessary to carry out statutes relating to milk producers and dairies. Regulation 11 provides as follows:

> "Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts Grade A Milk and milk products produced and processed in Mississippi on a reciprocal basis. The health authority is authorized to require and conduct laboratory analysis and investigations to determine if the milk and milk products are in compliance with this Regulation.

Plaintiff contends that the regulation is unconstitutional in that it imposes an undue and arbitrary restriction on commerce in violation of Article 1, Section 8, Clause 5, U.S. Constitution. Defendant

contends that the regulation was adopted as a statewide regulation to open milk trade with all other states, that its effect is to lower trade barriers, and that it is necessary to insure the enforcement of minimum standards for milk originating out of the state.

Plaintiff seeks to declare Regulation 11 unconstitutional and to enjoin the Health Officer of the State of Mississippi, his agents and employees from excluding plaintiff from delivering and selling milk in Mississippi by virtue of the refusal of the State of Louisiana to enter into a reciprocal agreement with the State of Mississippi pursuant to Regulation 11.

At a hearing on plaintiff's motion for a preliminary injunction seeking only the injunctive relief above referred to, plaintiff attached to its motion the affidavit of its vice-president and general manager of the New Orleans Division. He stated that of 105 dairy farms from which plaintiff purchases raw milk for processing at its Kentwood plant, 99 are located in the State of Mississippi; that plaintiff operates 38 supermarkets in the State of Mississippi, paying and collecting large amounts of taxes; and that plaintiff has an annual payroll of $4,000,000.00, paid to 1700 store employees, all residents of Mississippi. Attached to this affidavit are copies of two inspection reports made of the Kentwood plant. One, on a Department of Health, Education and Welfare, Public Health Service, Food and Drug Administration form, reveals the results of an inspection made on January 26, 1972, submitted by Raleigh J. Richard, Head, Division of Milk & Dairy Products. The other appears to be from Dr. James T. Perrett, Director, East Baton Rouge

Parish Health Unit to the same Raleigh J. Richard, Division of Milk & Dairy Products, reporting the results of an inspection of the same date.[1] Also attached to the affidavit are copies of correspondence, one a letter from Ramson K. Vidrine, M.D., State Health Officer, Louisiana State Department of Health to plaintiff, dated August 22, 1972, in which Vidrine confirmed that Louisiana had entered into no reciprocity agreements with any state, and that his office was not receiving any processed milk from Mississippi "because the milk does not meet our standards." The letter further stated that the Louisiana standards are above those set by the U.S. Department of Public Health and that the Louisiana standards are applied uniformly to intra-state and out-of-state producers and processors. The remaining correspondence consisted of two letters to plaintiff from Clinton Van Devender, Supervisor of the Milk Control Department of the Mississippi State Board of Health, dated September 5 and 18, 1972, respectively, setting out his department's requirements before plaintiff's plant and its products could be certified as complying with the Mississippi State Board of Health Regulations. One of these requirements is a "Certification of Reciprocity" to be executed by the appropriate Louisiana official.

At a hearing, defendant offered the testimony of Mr. Van Devender in rebuttal to plaintiff's affidavits and exhibits. Van Devender said that plaintiff was in the process of completing the Mississippi requirements, but had not submitted a reciprocity certificate as required by Regulation 11. He explained that the reason for the reciprocity agreement is that, in its absence,

1 It is not shown whether Richard is a state or federal official.

Mississippi officials have no way of knowing whether the Kenner plant meets minimum Mississippi health standards or not. He stated that on a reciprocal basis each state would accept the validity of the other's inspection. He conceded that he had seen the inspection made of the Kenner plant reported on the HEW form and that the plant and its processed milk would be acceptable to Mississippi, provided a reciprocity agreement was obtained from Louisiana. He further stated that his office has no legislative or any other kind of authority to make inspections outside the state. Lastly he identified a list of states with which Mississippi does have reciprocity agreements, including some plants in Alabama and Louisiana where milk was being sold in Mississippi before the Regulations were adopted in 1967.

Plaintiff relies primarily on *Baldwin v. Seelig, Inc.*, 294 U.S. 511, and its progeny, holding that a state, by law or regulation, cannot prescribe economic sanctions against the importation of milk from another state. Plaintiff also cites language from *Polar Co. v. Andrews*, 375 U.S. 361, at page 377: ". . . the State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate the . . . (its) milk industry from competition from other States."

The reason, however, for Mississippi's barrier against the importation of milk from Kentwood, is not an economic barrier but is based on the necessity of assuring its citizens that the Kentwood plant's processed milk meets Mississippi's health standards, clearly within a state's police powers, even though this requirement may cause some interference with

free trade. This argument, however, loses its efficacy if Mississippi officials are handily furnished Louisiana inspection reports such as that made on the HEW forms. The evidence is totally lacking in this regard.

Be that as it may, this Court cannot declare the unconstitutionality of Regulation 11. For that a three-judge court is required.

As to the request for a preliminary injunction, the Court is of the opinion that such relief should be denied. Plaintiff has shown no irreparable harm. Although plaintiff contends its Kentwood plant was completed in late 1971 in anticipation of a Mississippi market, it has not shown that such a market exists. In weighing the factor of an anticipated market against the defendant's contention that it has no way of inspecting the Kentwood plant except through a reciprocal agreement, this Court is loath to grant any preliminary relief until the entire matter can be considered by a three-judge court.

An appropriate order may be submitted denying the preliminary injunction. The Court suggests that the complaint be amended to request a three-judge court or it will be subject to dismissal.

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

DATED: Nov. 22, 1972

APPENDIX B

(Number and Title Omitted)

(1) Requesting Judge: Honorable Dan M. Russell, Jr.
Southern District of Mississippi

(2) District Judge: Honorable William Harold Cox
Southern District of Mississippi

(3) Circuit Judge: Honorable James P. Coleman

(4) Date of Order: February 28, 1973

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge

rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge Panel either preliminarily or on the trial of the mertis, or otherwise, as that Court thinks appropriate.

/s/ JOHN R. BROWN
JOHN R. BROWN
Chief Judge Fifth Circuit

APPENDIX C

(Number and Title Omitted)

Before COLEMAN, Circuit Judge, and RUSSELL and COX, District Judges.

OPINION OF THE COURT

Plaintiff, The Great Atlantic & Pacific Tea Company, Inc., a Maryland corporation doing business in both the States of Louisiana and Mississippi, filed the above styled action against Hugh B. Cottrell, M.D., the chief health officer for the State of Mississippi, seek-

ing a declaratory judgment voiding Section 11 of the "Regulation Governing the Production and Sale of Milk and Milk Products" adopted by the Mississippi State Board of Health on December 14, 1967, and injunctive relief restraining and enjoining the named defendant and his subordinates from excluding plaintiff from doing business in Mississippi pursuant to said Section 11. Jurisdiction is invoked under 28 U.S.C. §§ 1331 and 2201. Plaintiff, also called A & P, is engaged in the processing of fluid milk at its Kentwood, Louisiana, plant, for delivery to its retail stores in Louisiana and Mississippi. Plaintiff alleges that the defendant, charged with enforcing Section 11 of the Mississippi regulations, refuses to permit the entry into Mississippi of plaintiff's milk in the absence of a reciprocity agreement between Mississippi and Louisiana, and that, accordingly, Section 11 is unconstitutional in that it imposes an undue and arbitrary restriction on the free flow of commerce between the states, in violation of Article I, Section 8, Clause 3 of the U.S. Constitution. The defendant contends that Section 11 not only does not constitute a barrier to interstate commerce, but actually was adopted to open the milk trade with all other states; that its effect is to lower trade restrictions; and that the reciprocity clause is necessary to insure the enforcement of minimum health standards for milk originating out of the state. This Court finds that Section 11, including the reciprocal clause, is constitutional on its face presenting no barriers to trade between Mississippi and such states a s agree to reciprocity of inspection standards.

Prior to a full hearing on the merits, the undersigned, managing Judge denied a preliminary injunction in the absence of a three-judge Court to consider the constitutionality of Section 10, said section being a part of regulations of statewide import, and for the reason that plaintiff had failed to present evidence of irreparable harm in the absence of relief. The Court's findings appear of record in an opinion of November 22, 1972, unreported.

A three-judge Court, having been duly designated, has received evidence, consisting of lengthy stipulations of facts and exhibits thereto. At the conclusion of the evidence and oral argument, the Court requested both parties, by brief, to explore the possibility of joining the State of Louisiana as an indispensable party. Such briefs, as well as trial briefs, have been submitted.

The parties and the Court agree that the State of Louisiana is not subject to process under the Federal Rules of Civil Procedure, Rule 4, nor is its chief health official. In this connection defendant contends that plaintiff has standing to institute a suit similar to the instant action in the federal courts of Louisiana which may then be consolidated with this action under the rules for multi-district legislation, or that this Court can coercively require that step by dismissing this suit until plaintiff institutes a companion suit in Louisiana. Plaintiff argues that relief can be accorded without representation by Louisiana and without prejudice to that state. The Court agrees and finds that neither the State of Louisiana nor its chief health official is an indispensable party under Rule 19, and that

this Court can arrive at a complete adjudication on the merits of this action in the absence of Louisiana or its appropriate official as a party.

Stipulations of Facts

The parties introduced into the record a Stipulation of Facts to which are appended various documents, and an Amended Stipulation, also with appended documents. The facts are accepted by the Court as true and are digested as follows:

A & P is engaged in the processing of dairy products at its Kentwood, Louisiana, plant for delivery to its retail stores. The plant now supplies A & P grocery stores in the Louisiana market. A & P has been seeking a permit to enter the Mississippi market in order to supply its 38 retail outlets in Mississippi, on which it pays large amounts of taxes to Mississippi. A & P employs 1700 Mississippi residents in these outlets with an annual payroll of over $4,000,000.00. In an affidavit attached to the first stipulation, J. Y. Brashear, Vice President and General Manager, New Orleans Division of A & P, stated that of the 105 dairy farms from which A & P purchases raw milk for processing at the Kentwood plant, 99 are located in the State of Mississippi. Plaintiff's Kentwood processing plant received an inspection according to Louisiana quality and sanitation standards by the Louisiana Department of Health, Division of Milk and Dairy Products, on January 26, 1972, which yielded scores as follows: plant — 100%; producer — 94.86%; and pasteurized milk — 97.43%. By the amended stipulation, a more recent inspection in 1973 revealed the following scores:

plant — 98%; producer — 93.62%; and pasteurized milk — 95.80%. The defendant is charged with enforcing Section 11 of the Mississippi State Board of Health "Regulation Governing the Production and Sale of Milk and Milk Products," the entire section being as follows:

> "Milk and milk products from points beyond the limits of routine inspection of the State of Mississippi or its police jurisdiction, may be sold in the State of Mississippi or its police jurisdiction, provided they are produced, pasteurized and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis. The health authority is authorized to require and conduct laboratory analysis and investigations to determine if the milk and milk products are in compliance with this Regulation."

Plaintiff has requested from defendant a permit to deliver its milk processed in the Kentwood plant to its stores in Mississippi. Defendant has refused to certify plaintiff on the ground that Louisiana has failed to enter into a reciprocity agreement with Mississippi. pursuant to Section 11. A letter dated September 5.

1972, from Clinton Van Devender, Supervisor, Milk Control Program, Mississippi Board of Health to an A & P official, advised that a signed "Certificate of Reciprocity" was required. The letter and a reciprocity certificate form are exhibits to the stipulation. A letter from the State Health Officer of the Louisiana Department of Health to A & P, dated August 22, 1972, an exhibit, acknowledged that no reciprocity agreement exists between Louisiana and Mississippi pertaining to reciprocal sanitation inspections regarding milk, nor with any other state. The letter also stated: "At the present we are not receiving out-of-state *processed* milk from Mississippi, . . . because the milk does not meet our standards." Further stipulated was that in the testimony of Clinton Van Devender, who testified at the preliminary hearing, Mr. Van Devender explained that the reason for the reciprocity agreement is that, in its absence, Mississippi officials have no way of knowing whether or not the Kentwood plant meets Mississippi health standards or not. He conceded that he had seen the inspection made of the Kentwood plant as reported on a Department of Health, Education and Welfare, Public Health Service, Food and Drug Administration form, and that the Kentwood plant and its processed milk would be acceptable to defendant, because the Louisiana regulations were substantially equivalent within the meaning of Section 11, and thus the only additional requirement is a reciprocity agreement from Louisiana. He also identified a list of states with which Mississippi has reciprocity agreements. Identified by asterisk are four plants in Louisiana and two plants in Alabama, whose processed milk enters into Mississippi, although Mississippi has no reciprocity

agreement with Alabama or Louisiana. The only explanation offered on the list is that these plants were moving milk into Mississippi before Section 11 was adopted. A transcript of Van Devender's testimony is attached to the stipulation in which he confirmed the above exceptions to Section 11. Further in the stipulation the parties agreed that if plaintiff complied with Section 11 by furnishing a "Certificate of Reciprocity" and *otherwise* complied with Mississippi health standards, plaintiff can market in its Mississippi retail outlets the milk processed in its Kentwood plant. (Underscoring added). The parties agreed that the difference between what plaintiff pays to processors outside the State of Mississippi for milk which plaintiff stocks in its Mississippi stores and the cost of what plaintiff can produce for itself amounts to $195,700 per annum, this statement appearing in the uncontested affidavit of plaintiff's New Orleans Division Treasurer, who also averred the presence of an actual market in Mississippi, the affidavit being attached to the stipulation.[1] The parties agreed that Mississippi officials inspect each dairy farm, milk hauler, milk plant, receiving station and transfer station whose milk or milk products are intended for human consumption within the state or its police jurisdiction in the manner prescribed in Sections 5 and 6 of the Mississippi milk regulation, these sections being an exhibit to the stipulation. The Mississippi milk and milk product quality standards appearing in Section 7 of the regulations are attached as an exhibit. Louisiana's

1 Obviously furnished in view of the earlier findings that plaintiff failed to present evidence of irreparable injury at the hearing for a preliminary injunction.

milk quality standards contained in Chapter V (Milk, Milk Products and Manufactured Milk Products Regulations) of the Sanitary Code of Louisiana are an exhibit, as well as Mississippi's Milk Plant Inspection Report and Dairy Farm Inspection Report forms, a list of sources of "Grade A Milk and Milk Products Sold in Mississippi," and an excerpt from the "Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers", published by the United States Department of Health, Education and Welfare, on April 1, 1972, containing the ratings of interstate milk shippers from Louisiana, and which reflects that the compliance rating of plaintiff's Kentwood plant in 1971 had a plant rating of 100% and a pasteurized milk rating of 98%. By a supplemental stipulation of facts, a full copy of Mississippi's "Regulation Governing the Production and Sale of Milk and Milk Products," adopted by the Mississippi State Board of Health on December 17, 1967, and all amendments thereto, is made a part of the record. Added as additional exhibits are amendments to Chapter V of Louisiana's milk regulations, a copy of the Louisiana State Department of Health "Pasteurization Plant Inspection Form' " a copy of a letter of November 14, 1973, from the head of the Louisiana Division of Milk and Dairy Products to plaintiff showing the results of a 1973 inspection of the Kentwood plant, reported above, and another excerpt from the 1973 "Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers," published by the U.S. Department of Health, dated October, 1973, reflecting the ratings of interstate milk shippers from Louisiana, including a rating of the Kentwood plant in 1972 as: plant — 100%, and pasteurized milk — 97%.

The Court has familiarized itself with the agreed to stipulations of fact, all the exhibits of record, and the parties' argument, both oral and by brief.

Plaintiff, admitting that it has no standing or power to demand that Louisiana enter into a reciprocity agreement with Mississippi, nevertheless claims that the stipulated facts show without dispute that plaintiff has fully complied with all health related requirements of the Mississippi milk regulation, and that the refusal of the Mississippi authorities to issue plaintiff a permit to distribute its processed milk from plaintiff's Kentwood plant across the state line to plaintiff's retail outlets in Mississippi, in the absence of a "Certificate of Reciprocity" executed by the appropriate Louisiana official, which certificate plaintiff, without fault, has been unable to secure, interferes with the exclusive power of the Congress "to regulate Commerce . . . . among the several States", in violation of the thus quoted Commerce Clause. Plaintiff insists that the evidence clearly establishes that defendant's insistence on a certification of reciprocity is the sine qua non, unrelated to health standards, for the admittance of plaintiff's otherwise acceptable milk, pointing to the fact that defendant concedes that it does not deny the entry of milk from four Louisiana processors which were importing milk into Mississippi prior to the adoption of Section 11, and which are permitted to continue despite the lack of certification. Plaintiff concedes that Mississippi's exercise of its police power may require that out-of-state milk processors meet Mississippi health and sanitation standards, and that Mississippi may issue regulations governing same, but that such regulations may not be

a subterfuge by which the health agency would place the state in economic isolation, relying on the concepts of law established in *Polar Co. v. Andrews*, 375 U.S. 361; *Dean Milk Co. v. City of Madison*, 340 U.S. 349; *H. P. Hood & Sons v. DuMond*, 336 U.S. 525; and *Baldwin v. Seelig, Inc.*, 294 U.S. 511. All of these cases stem from disputes between the exclusive authority of the Congress to regulate interstate commerce without interference from the states, and the federally recognized rights of a state's exercise of its police powers designed to protect the health of its citizens, particularly with regard to milk because of its nutritional importance and susceptibility to contamination.

In *Baldwin v. Seelig*, supra, the Supreme Court said: "It is the established doctrine of this court that a state may not, in any form or guise, directly burden the prosecution of interstate business." And on page 527: "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation . . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." In *Baldwin* the court considered the New York Milk Control Act of 1933 which set up a system of minimum prices to be paid by dealers to producers. A part of the Act extended protective prices to that part of the milk supply which came from other states. The Court struck down the act finding that it is one thing for a state to exact adherence by an importer to fitting standards of sanitation before his product may be sold in

the state's market, but it is a very different thing to establish a price scale for use in other states and to bar the sale unless the scale has been observed.

In *H. P. Hood & Sons, Inc. v. DuMond*, supra, a Massachusetts milk distributor applied for a license for an additional plant in New York under an agricultural marketing statute. The application was denied on the grounds that the proposed expansion would reduce the supply of milk for local markets and would result in destructive competition in a market already adequately served. The New York law was struck down on the grounds that a state may not promote its own local economic advantages by curtailing the volume of interstate commerce. Mr. Justice Jackson, writing for the Court, said: "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a constitutional standpoint, hardly controversial." But, in referring to *Baldwin v. Seelig* as relevant to *Hood*, he further said: "In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competition."

Dean Milk Co. v. Madison, supra, involved part of a city ordinance making it unlawful to sell milk unless pasteurized at a plant within five miles of the center of Madison, Wisconsin, and another section prohibiting the receipt, storage or sale of milk unless from a source of supply possessing a permit issued after inspection by Madison officials, who were expressly

relieved from inspection twenty-five miles beyond the center of the city. Mr. Justice Clark, in striking down the ordinance, said: "But this regulation, like the provision invalidated in *Baldwin v. Seelig, Inc.*, supra, in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois . . . . In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonably nondiscriminatory alternatives, adequate to conserve legitimate local interests, are avilable." The Court found two reasonable and adequate alternatives, saying that if the City of Madison preferred to rely on its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost to the importing producers and processors. The second alternative grew out of the fact that the Illinois producer's milk was processed in plants inspected by the public health authorities of Chicago under the Chicago ordinance which adopted the rating standards recommended by the United States Public Health Service. In a footnote to *Dean*, Section 11 of the U.S. Public Health Service Milk Ordinance of 1939 is quoted verbatim, with the following comment from the Public Health Service Code: "It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agen-

cy a rating of 90 percent or more on the basis of the Public Health Service rating method." Interestingly enough Section 11 of the Mississippi regulation, but for the reciprocal clause, is identical in every material aspect to Section 11 of the U.S. Public Health Service Ordinance.

In *Polar Co. v. Andrews*, supra, also relied on by plaintiff, citing *Baldwin v. Seelig*, supra, *Hood & Sons v. DuMond*, supra, and *Dean Milk Co. v. Madison*, supra, as controlling, held that the Florida Milk Control Act which excluded out-of-state milk from a major portion of the state's market could not be justified as an economic measure to protect the welfare of local dairy farmers or as a health measure designed to insure the existence of a wholesome supply of milk. Further, the Court ruled that Florida has no power to prohibit the introduction within her territory of milk of wholesome quality acquired in another state.[2]

Defendant contends that the above referred to cases relied on by plaintiff are inapposite because the circumstances in each involved economic barriers, protectionist in design and result, and they all involved price and area discrimination which a willing out-of-state producer could not surmount by meeting other standards. With this contention, the Court agrees.

---

2 It could be reasoned that the offending state here is not Mississippi but Louisiana which has refused to issue plaintiff a certificate of reciprocity, and which caused the Court's request to explore whether or not Louisiana officials could be made a party.

Also defendant insists that Section 11, both in intent and effect, creates reciprocal *standards of inspection* and not strict trade reciprocity. Attached to defendant's trial brief is a chart contrasting Louisiana's standards of inspection with those of Mississippi, the standards of both states being in evidence, which shows that the Mississippi standards are more stringent than that of Louisiana. Proceeding upon this conclusion, Mississippi, by waiving its stricter milk standards in favor of that of Louisiana, if Louisiana authorities will make the same commitment, is, by virtue of its Section 11, opening the milk trade with all other states, and for proof of this, points to the list of states with which Mississippi has reciprocal standards of inspection. This argument, of course, assumes that the Mississippi standards are stricter than those of Louisiana, despite the letter of August 22, 1972, from the Louisiana state health officer to plaintiff saying that Mississippi processed milk does not meet the standards of Louisiana. Nevertheless, the Court is satisfied that Section 11, insofar as it follows Section 11 of the U.S. Public Health Service Milk Ordinance, is a warranted exercise of Mississippi's police powers free of any constitutional infirmity. And, on its face, including the reciprocal inspection standards, Section 11 is within the permissible limits of state police powers even though it incidentally or indirectly involves or burdens interstate commerce. See *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346. The extent of the burden is found in the word "reciprocity," its ordinary meaning being "a mutual exchange of privileges." As long as Mississippi mutually exchanges standards of inspection with other states, there can be no burden on interstate trade.

The fact that Mississippi has engaged and expects to continue to engage in reciprocity militates against invalidating Section 11. The problem here arises out of the fact that Louisiana has refused reciprocal standards of inspection. The Court has all along realized that no relief can be granted against Louisiana or its health officials in their absence as parties to the suit. Under *Dixie Dairy Co. v. Chicago*, 355 F.Supp. 1351, the right of either Louisiana or Mississippi to enforce its own standards, either through inspections at the source of the processed milk, although such may require out-of-state inspections, or through reciprocal agreements is unquestioned. Although this case also holds that no state may be forced to relinquish its local police power on the basis of reciprocity, it does not hold that a state cannot insist on reciprocity in lieu of out-of-state inspections. Mississippi may still insist on compliance with its own health and sanitation standards, and it may continue to waive its requirements as provided in Section 11. Accordingly, the Court declines to find that Section 11 is unconstitutional in placing an undue burden on interstate commerce.

During the course of this hearing no explanation was offered by defendant as to why it receives processed milk from producers in Alabama and Louisiana in the absence of a reciprocity agreement with those states except that processed milk from these sources was received before the adoption of Section 11 and continues to be received. No evidence was offered that Mississippi officials inspect this milk at its out-of-state source. According to the testimony of Van Devender, Mississippi adopted the reciprocity clause

to avoid the expense of out-of-state inspections. The Court therefore assumes that Mississippi accepts the inspections and ratings of either Alabama or Louisiana officials, as the case may be. Plaintiff argues that for Mississippi to accept processed milk from four Louisiana processors without requiring a certificate of reciprocity, and, at the same time, deny plaintiff a permit in the absence of such certificate, is an unevenhanded, arbitrary action, depriving plaintiff of its right to equal protection. The Court disagrees. To rule otherwise, would be to hold that Mississippi could not, in the future, exercise its reciprocity clause with respect to processors in the States of Alabama and Louisiana. If the reciprocity clause could be said to be retaliatory in nature, the guilty party is Louisiana, not Mississippi.

An order may be submitted upholding the validity of Section 11 and dismissing plaintiff's suit. Let Court costs be taxed to the plaintiff.

/s/ JAS. P. COLEMAN
UNITED STATES CIRCUIT JUDGE

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE

DATED: Oct. 28, 1974

APPENDIX D

(Number and Title Omitted)

JUDGMENT

This cause having come on for hearing before the Three Judge Court, and the Court having received evidence consisting of live testimony, stipulations, and exhibits, and having considered the briefs and arguments of counsel, the Court having considered the same and being fully advised in the premises does hereby order in conformity to the memorandum opinion of October 28, 1974.

ORDERED, ADJUDGED, AND DECREED as follows:

(1) That the Court has jurisdiction of the parties and the subject matter and is properly constituted under 28 U.S.C. 2281.

(2) That §11 of the "Regulation Governing the Production and Sale of Milk and Milk Products" adopted by the Mississippi State Board of Health on December 14, 1967, is valid and constitutional; that the regulation does not violate Article I, Section 8, Cl. 3, the Commerce Clause of the Constitution of the United States, nor does it violate the 14th Amendment.

(3) That the plaintiffs are not entitled to an injunction against §11 and that their Bill of Complaint should be dismissed with prejudice.

(4) That all costs should be taxed to the plaintiff.

ORDERED, ADJUDGED, AND DECREED, this, the 13th day of November, 1974.

/s/ JAS. P. COLEMAN
CIRCUIT JUDGE

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE

APPENDIX E

In The United States District Court
For The Southern District Of Mississippi
Jackson Division

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Plaintiff

versus C.A. No. 72J-212(R)

HUGH B. COTTRELL, M.D., HEALTH OFFICER, STATE OF MISSISSIPPI,

Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Great Atlantic & Pacific Tea Company, Inc., the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the Order entered in this action in favor of Defendant on November 13, 1974. This appeal is taken pursuant to 28 U.S.C. §1253.

/s/ HOWARD S. LINZY
HOWARD S. LINZY
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
(504) 524-4162

/s/ CHARLES R. DAVIS
CHARLES R. DAVIS
Thomas, Price, Alston, Jones & Davis
Suite 507 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
(601) 948-6882

COUNSEL FOR
THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.

CERTIFICATE

I, Samuel Lang, one of the attorneys for The Great Atlantic & Pacific Tea Company, Inc., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on the 11th day of December, 1974, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the State of Mississippi, by mailing a copy in a duly addressed envelope, with postage prepaid, to Honorable A. F. Summer, Attorney General, State of Mississippi, Post Office Box 220, Jackson, Mississippi 39205.

2. On Hugh B. Cottrell, M.D., Health Officer, State of Mississippi, State Board of Health, Jackson, Mississippi 39205, to his attorney of record as follows:

Heber A. Ladner, Jr.
Special Assistant
Attorney General of Mississippi
Suite 1638, Capital Towers
Jackson, Mississippi 39201

It is further certified that all parties required to be served have been served.

/s/ SAMUEL LANG
SAMUEL LANG
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
(504) 524-4162

ATTORNEY FOR THE
GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-613

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,
v.
HUGH B. COTTRELL, M.D., HEALTH OFFICER STATE OF MISSISSIPPI

ORDER

UPON CONSIDERATION of the application of counsel for appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including March 13, 1975.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 28 day of January, 1975

Supreme Court, U. S.
FILED
JUN 25 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Appellant,

versus

HUGH B. COTTRELL, M.D., HEALTH OFFICER, STATE OF MISSISSIPPI,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI

APPEAL DOCKETED MARCH 12, 1975
PROBABLE JURISDICTION NOTED MAY 12, 1975

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1148

The Great Atlantic & Pacific Tea Company, Inc.,
Appellant

vs.

Hugh B. Cottrell, M.D., Health Officer,
State of Mississippi, Appellee

INDEX

Page

Chronological List of Relevant Docket Entries 1

Plaintiff's Suit For Declaratory Judgment And Injunctive Relief 2

Opinion of single-judge court 9

Opinion of three-judge court 9

Judgment of three-judge court 9

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Oct. 25, 1972 — Plaintiff The Great Atlantic & Pacific Tea Company, Inc.'s petition filed in the U.S. District Court for Southern District of Mississippi, Jackson Division.

Nov. 20, 1972 — Defendant Hugh B. Cottrell's answer.

Nov. 24, 1972 — Opinion of single-judge court.

Jan. 5, 1973 — Plaintiff's motion to amend to include a request that a three-judge district court be convened.

Nov. 16, 1973 — Stipulation of facts filed and trial.

Oct. 28, 1974 — Opinion of three-judge court.

Nov. 13, 1974 — Judgment of three-judge court.

Dec. 11, 1974 — Plaintiff's Notice of Appeal to the Supreme Court of the United States filed.

May 19, 1975 — Copy of order of Supreme Court of the United States noting probable jurisdiction.

SUIT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

United States District Court
Southern District of Mississippi
Jackson Division

The Great Atlantic & Pacific Tea Company, Inc.

versus No. 72-J-212(R)

Hugh B. Cottrell, M.D., Health Officer,
State of Mississippi

Plaintiff, The Great Atlantic & Pacific Tea Company, Inc., through undersigned counsel, complains as follows:

1.

This Court has jurisdiction of this suit pursuant to provisions of Sections 1331 and 2201, Title 28 United States Code. The matter in controversy exceeds the sum of value of $10,000.00 exclusive of interest and cost and arises under the Constitution of the United States. There exists between the plaintiff and defendant an actual justiciable controversy in respect to which plaintiff requires injunctive relief as well as a declaration of rights by this Court. Venue properly is laid in this district and division. 28 U.S.C. §§ 1391 (b), 1393 (a).

2.

Plaintiff, The Great Atlantic & Pacific Tea Company, Inc., incorporated in Maryland, is engaged in the

business of processing dairy products at its Kentwood, Louisiana plant for delivery to its retail stores in Louisiana and Mississippi.

3.

The Kentwood plant receives a large supply of raw milk from producers in Mississippi.

4.

The Kentwood A & P milk plant has received a Louisiana Department of Health rating, made on January 26, 1972, recording the plant's score — 100 per cent and producer's score — 94.86 per cent; a copy of the rating report is attached to and made a part of this complaint as if copied herein *in extenso*.

5.

Defendant is vested with powers to supervise, investigate, and regulate the fluid milk industry of the State of Mississippi in the public interest.

6.

Defendant is charged with enforcing Section 11 of the Mississippi State Board of Health "Regulations Governing the Production and Sale of Milk and Milk Products," a copy of which is attached hereto and made a part hereof, which, *inter alia*, refuses entry into Mississippi of milk processed out of state unless the sister state accepts Mississippi-processed milk on a reciprocal basis.

7.

Plaintiff has requested permission to deliver milk to its retail outlets in Mississippi and has been denied same by the State of Mississippi for the sole reason that plaintiff has not supplied defendant with a "Certification of Reciprocity" from the State of Louisiana.

8.

Plaintiff alleges that the defendant's refusal to permit plaintiff to deliver out-of-state processed milk to its Mississippi retail outlets violates the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3.

9.

Plaintiff alleges that defendant's action constitutes a real and irreparable injury and it has no other adequate remedy at law.

10.

In order to protect plaintiff's rights it is necessary that this Court permanently restrain and enjoin the defendant, his agents, employees, and all other persons acting or claiming to act in his behalf, from excluding plaintiff from doing business in the State of Mississippi pursuant to aforementioned Section 11.

11.

Upon information and belief plaintiff alleges that during the pendency of these proceedings the defen-

dant will continue interfering in plaintiff's free exercise of selling milk in the State of Mississippi; therefore, it is necessary that this Court issue a preliminary writ of injunction in the form and substance of the permanent injunction mentioned above in order to protect complainant's rights.

WHEREFORE plaintiff respectfully prays:

1.

That the defendant be duly ordered to show cause on a day and at an hour to be fixed by this Court why a preliminary injunction enjoining and prohibiting defendant, his agents, employees, and all other persons acting or claiming to act in his behalf, from excluding plaintiff from doing business in the State of Mississippi pursuant to the Mississippi State Board of Health "Regulations Governing the Production and Sale of Milk and Milk Products," Section 11.

2.

That, after due proceedings had, judgment be rendered herein in favor of the plaintiff, The Great Atlantic & Pacific Tea Company, and against the defendant, Hugh B. Cottrell, State Health Officer, decreeing the above-described acts of the defendant to be illegal, unconstitutional, injurious to plaintiff, and an impairment of its rights, perpetuating the said preliminary writ of injunction and making it permanent in the form and substance of the preliminary injunction mentioned hereinabove; and for all costs of these proceedings.

3.

That the Mississippi State Board of Health Regulations, Section 11, insofar as here pertinent, be declared illegal and unconstitutional.

That judgment issue in favor of plaintiff for such other and further relief as the law and the facts support.

RESPECTFULLY SUBMITTED,

(Signed) JULIAN R. MURRAY, JR.
JULIAN R. MURRAY, JR.
Kullman, Lang,
Inman & Bee
Post Office Box 60118
New Orleans, Louisiana 70160

ALEX A. ALSTON, JR.
Thomas, Price,
Alston, Jones & Davis
Post Office Box 1532
Jackson, Mississippi 39205
Tel: 948-6882
Attorneys for The
Great Atlantic &
Pacific Tea
Company, Inc.

Please Serve:
Hugh B. Cottrell, M.D.,
Mississippi State Health Officer
Jackson, Mississippi 39205

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION

INTERSTATE MILK SHIPPER REPORT

INTERNAL USE ONLY

1. NAME OF SHIPPER
The Grant A & P Tea Co.

2. CITY
Kentwood

3. STATE
La.

4. STREET

PERMIT NUMBER

SURVEY DATA

MORE THAN ONE GRADE OF MILK RECEIVED [ ] YES [X] NO

	PRODUCERS	RECEIVING STATIONS	PASTEURIZATION OR DRYING PLANT	PASTEURIZED MILK	ENFORCEMENT
TYPE OF RATING (Area or Individual)	ARF		Individual		
RATING (%)	96		100	98	98
DATE OF RATING	3-19-71		1-26-72		3-71
TOTAL NUMBER	984		1		
NUMBER INSPECTED	213		1		
VOLUME RECEIVED DAILY (Pounds)			8218		

SURVEY AGENCY (07-71): [X] SHD [ ] SDA [ ] LSD
SURVEY OFFICER: Jack Blanks
DATE SURVEY OFFICER CERTIFIED: 5/68
EARLIEST RATING DATE: MONTH 3, DAY 19, YEAR 71

AGENCY PROVIDING CONTINUOUS SUPERVISION TO SUPPLY: La. State Dept of Health

LABORATORY CONTROL

APPROVED LABORATORY NUMBER OR NAME AND ADDRESS: La. State Dept of Health, New Orleans
DATE OF LAST SURVEY: 3/12/70
DAIRY FARM TESTS APPROVED: BRC [X] a. [ ] b. | PLATE [X] a. [ ] b. | PHOS [X] a. [ ] b. | RDC [ ] a. [ ] b.

RAW MILK TESTS APPROVED

VIABLE COUNTS: a. 1701 b.
INHIBITORS: a. [X] b. [ ]
SCREENING TESTS: a. MWT b.
CONFIRMATORY TESTS: a. IKISCC b.

DATE OF LAST TWO DAIRY SAMPLES: a. 3-11-69 b. 5/29-69
APPROVED DAIRY LABORATORY AND DATE: La. State Dept of Health, N.O.
WATER TESTS APPROVED: [X] YES [ ] NO

PUBLICATION (Written permission from shipper must be filed at Regional Office of USPHS prior to publication of ratings)
LETTER OF PERMISSION TO PUBLISH IS TRANSMITTED WITH THIS REPORT: [X] YES [ ] NO

10. SUBMISSION OF REPORT BY STATE AGENCY
DATE OF REPORT: 2-7-72
SUBMITTED BY (Signature and Title): Raleigh J. Richard
Raleigh J. Richard, Head, Div. of Milk & Dairy Products

FOR FDA REGIONAL OFFICE USE ONLY
Written permission from shipper dated ____ on file and publication of ratings recommended.
DATE
SIGNATURE (FDA Reporting Officer)

FD FORM 2359, (5/71)

BEST COPY AVAILABLE

SECTION 11. MILK AND MILK PRODUCTS FROM POINTS BEYOND THE LIMITS OF ROUTINE INSPECTION

Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U. S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis. The health authority is authorized to require and conduct laboratory analysis and investigations to determine if the milk and milk products are in compliance with this Regulation.

Opinion of single-judge court is found at page 1a of Appellant's Jurisdictional Statement.

Opinion of three-judge court is found at page 8a of Appellant's Jurisdictional Statement.

Judgment of three-judge court is found at page 3a of Appellant's Jurisdictional statement.

S... Court, U. S.
FILED
APR 23 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,

vs.

HUGH B. COTTRELL, M. D., HEALTH OFFICER, STATE OF MISSISSIPPI,
Appellee.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION TO DISMISS

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

E. L. MERDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

MOTION TO DISMISS OR AFFIRM 1

Certificate 3

BRIEF IN SUPPORT OF MOTION TO DISMISS 5

Facts 5

A. Statement of the Case 5

Argument 11

I. Reciprocity of Inspection Standards and Inspection Results As an Alternative to Extra-territorial Inspections or Excise Taxes on Producers Does Not Unconstitutionally Burden Interstate Commerce 11

II. This Court Lacks 28 USC §1253 Jurisdiction of the Appeal Concerning Those Out-of-State Processors Who Were Grandfathered in When §11 Was Adopted; the Order Appealed from, Properly Considered, Does Not Deny an Injunction Concerning a Specific State Statute or Regulation Concerning Grandfathered Dairies; Alternatively, There Is No Jurisdiction Because A & P Has No Standing to Challenge the Shipping of Milk by Other Out-of-State Dairies 21

Conclusion 27

Table of Authorities

CASES

Bailey v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962) 25

Baldwin v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1934) 16, 19
Dean Milk Company v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) 16, 19
Dixie Dairy Co. v. *City of Chicago*, 355 F.Supp. 1351 (N.D. Ill., 1973) 18
Florida Lime and Avacado Growers, Inc. v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) 13
Frasier v. *Board of Trustees of University of North Carolina*, (D.C. N.C., 1955) 134 F.Supp. 589, aff'd without op. 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956) 26
Golden v. *Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969) 25
Great Atlantic & Pacific Tea Co. of La. v. *Cottrell*, 383 F.Supp. 569 (S.D. Miss., 1974) 5, 9, 10, 23
Gulf Oil Corp. v. *Copp Paving Co.*, ... U.S. ....., 95 S.Ct. ....., 42 L.Ed.2d 378 (1974) 15
H. P. Hood & Sons v. *Dumond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948) 13
Huron Cement Co. v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) 18
Lawton v. *Steel*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894) 17
Milk Control Board v. *Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 20
Mintz v. *Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245 (1933) 20
Moody v. *Flowers*, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed. 2d 643 (1967) 23-24, 26
Perez v. *Ledesma*, 401 U.S. 87, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) 27

Phillips v. *United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941) 26
Polar Ice Cream & Creameries Co. v. *Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964) 16
Public Service Commission v. *Wycoff*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952) 25
Rockefeller v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970) 26
United Public Workers of America v. *Mitchum*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) 25
United States v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1943) 13

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES

Article I, §8, Clause 5, Constitution of the United States 5
Regulations Governing the Production and Sale of Milk and Milk Products, Section 11 ..... 1, 2, 5-7, 9, 11-15, 17-27
28 USC 1253 ..... 2, 23, 24, 25, 26
28 USC 2281 ..... 2, 23, 24

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,

vs.

HUGH B. COTTRELL, M. D., HEALTH OFFICER, STATE OF MISSISSIPPI,
Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court under Supreme Court Rule 16 to dismiss the appeal in that (1) it does not present a substantial federal question as to the claim that §11 of the Mississippi State Board of Health "Regulation governing the production and sale of milk and milk products" unconstitutionally burdens interstate commerce by requiring reciprocal standards of milk inspection and milk ratings between shipping and accepting states, or (2) a substan-

tial federal question that the requirement of reciprocal inspection ratings and inspection standards for out-of-state milk instead of taxes on producers to support extra-territorial inspections is irrational or constitutes an impermissible burden on interstate commerce. (3) Further, this Court lacks jurisdiction of the claim that the shipping of processed milk by Louisiana companies grandfathered in when the present Regulation 11 was passed, since that claim does not attack a statute or regulation of statewide application under 28 USC 2281.

Alternatively, appellee moves the Court to affirm the final judgment of the District Court on the ground that it is manifest that the questions upon which the decision of the cause depends are so insubstantial as not to need further argument: (1) Because the claim that a state may not, consistent with the commerce clause, rely upon reciprocal inspection standards and ratings thereunder rather than inspect plants and facilities outside the accepting state is obviously without merit and because its unsoundness is unmistakably clear from the previous decisions of this Court. (2) Because the claim that Mississippi is furthering the interests of local producers and discriminating against out-of-state producers is contrary to the finding of fact made by the District Court that the regulation is free trade in effect by facilitating the flow of out-of-state milk from nine sister states. (3) Because the equal protection claim asserted by appellant that certain producers were grandfathered in before the present regulatory scheme took effect was not within the jurisdiction of the Three Judge Court under 28 USC 2281 and not within the appellate jurisdiction of this Court under 28 USC 1253.

It is, therefore, respectfully moved that this appeal be dismissed and, in the alternative, that the judgment of the District Court denying all relief be affirmed.

Respectfully moved, this, the 22nd day of April, 1975.

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

By: HEBER LADNER, JR.

CERTIFICATE

I, Heber Ladner, Jr., one of the attorneys for the appellee, hereby certify that I have this day mailed, postage prepaid, via United States Mail, a true and correct copy of the foregoing Motion to Dismiss or Affirm to Sam Lang and Howard S. Linzy, Esq., attorneys for the appellant, at their usual mailing address, P. O. Box 60118, New Orleans, Louisiana 70160.

This, the 22nd day of April, 1975.

HEBER LADNER, JR.

BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTS

A. Statement of the Case

On October 25, 1972, the appellant Great Atlantic & Pacific Tea Company, Inc. [hereafter A & P], filed this suit to invalidate §11 of the milk regulations of the Mississippi State Board of Health. That regulation requires that Mississippi health authorities accept the substantial equivalency of Louisiana's milk regulations and Louisiana's milk ratings of 90 percent or more if Louisiana will reciprocate as to Mississippi's milk in these same two undertakings. Mississippi has accepted Louisiana's regulations and ratings with respect to appellant A & P. Louisiana declines to reciprocate. Under the regulation Louisiana processed milk is then barred from Mississippi.

A & P alleges that Mississippi's requirement that Louisiana reciprocate in its ratings and standards of inspection for out-of-state processed milk infringes Article I, §8, Clause 5, of the Constitution of the United States. After hearing and the submission of extensive stipulations of fact, the Three Judge Court held that the challenged section of Mississippi's regulations was a warranted exercise of Mississippi's police power free from any constitutional infirmity. *Great Atlantic & Pacific Tea Co. of La.* v. *Cottrell*, 383 F.Supp. 569, Three Judge Court (S.D. Miss., 1974).

The District Court concluded that Mississippi's triple-edged requirements of (1) milk production and processing under substantially equivalent regulations by a sister state; (2) a milk rating of 90 percent or above according to U. S.

Public Health Service standards; and (3) reciprocity of inspection ratings and inspection standards between sending and receiving states, were constitutional. The Court reasoned that the incidental or indirect burden upon commerce was overborne by specific proof that the application of Mississippi's regulation was free trade in design and effect. Sixteen dairies from nine states export milk to Mississippi under reciprocal agreements. The mutual exchange of inspection results and standards of inspection between sister states under §11 actually facilitates commerce in milk.

The Court found that Mississippi's policies had demonstrably opened free milk trade, lowered trade restrictions, and insured the enforcement of minimum health standards for milk originating out of state. The reciprocity created by §11 was viewed by the District Court as a reasonably nondiscriminatory alternative to onsite inspections of milk processing facilities outside the police jurisdiction of Mississippi or an excise tax on processors to defray the cost of these inspections. Accordingly, the complaint was dismissed on the merits. This appeal ensued.

In 1969 the Great A & P Tea Company of Louisiana leased from Dairymen, Inc., a dairy processing facility in Kentwood, Louisiana. That facility produces all the milk at issue in this case. According to the affidavit of Wade Buff, the Kentwood facility presently produces 2,903,000 gallons of milk ultimately sold within the State of Louisiana. The permit was sought for the excess capacity of approximately 750,000 gallons per year. After the plant was acquired no production was had during 1970 nor during the first two calendar quarters of 1971. Serious production was begun in the Kentwood facility in 1972. [Exhibit G, pp. 2-4, *Original Stipulation*]

On August 28, 1972, three years after acquisition of the Kentwood facility, A & P sought a permit to distribute its Kentwood products in the State of Mississippi. [*Original Stipulation*, Exhibit IV] A & P failed to forward the requested reciprocal agreement certifying that Louisiana would accept the validity of Mississippi's inspections. Apparently A & P viewed the statement of Louisiana's Chief Health Officer that Louisiana had not entered reciprocity agreements with any states as a circumstance rendering compliance impossible. Thereafter A & P treated the September 18, 1972, letter from the Supervisor of Mississippi's Milk Control Program as a final denial and thereafter entered suit. [*Original Stipulation*, Exhibits II, V]

§11 is Mississippi's answer to the interruption in trade that results when states like Louisiana bar out-of-state processed milk. It is against the backdrop of the regulations applicable to domestic producers that §11 is best understood. Without §11, each state's different and exacting standards come into play. Because of milk's unique nutritional importance and susceptibility to contamination, its processing and pasteurization are subject to extremely exacting standards. [See Exhibit H, Regulation Governing the Production and Sale of Milk Products, Mississippi State Board of Health, *Original Stipulation;* and Exhibit J, Milk and Milk Products Regulations, Chapter V, Sanitary Code of the State of Louisiana, Louisiana State Board of Health] A categorical comparison between the applicable Louisiana and Mississippi inspection standards yields the following result:

Items	Louisiana	Mississippi	Interpretation
Imported Milk	May accept certification of inspection and supervision from other governmental agencies	Certification of reciprocity of inspection and supervision of sanitation and 90% or above sanitation compliance	Mississippi is equal to or exceeds Louisiana's requirements
Frequency of Tuberculosis Tests of Dairy Cattle	Six years	Three years	Mississippi exceeds
Lighting and Ventilation in Barns	Ten percent of floor area in windows	Eight square feet per stanchion	Mississippi exceeds
Lighting and Ventilation in Milk House	Ten percent of floor area in windows	Fifteen percent of floor area in windows	Mississippi exceeds
Pasteurized Milk Delivery Temperature	50° F.	45° F.	Mississippi exceeds
Frequency of Dairy & Plant Inspections	At least one per six months	At least four per six months	Mississippi exceeds
Abnormal Milk (Mastitis) Standard	No specific requirement shown in Louisiana Regulation	Maximum of 1,000,000 per ml. cell count per ml. of milk	Mississippi exceeds
Degrading or Permit Suspension for Violating Mastitis Tests	Three consecutive violations	Violation of three out of last five sample results	Mississippi exceeds
Frequency of Milk Sampling	None listed	At least four per six months	Mississippi exceeds

These line-by-line comparisons are drawn from Exhibits H and J, *Original Stipulation*. They reveal the basic differences between Louisiana's and Mississippi's domestic requirements. The District Court assumed, arguendo, that this chart was a true representation of the differences in health, production, and sanitation standards. *Great A & P Tea Co., Inc. v. Cottrell, supra*, p. 575. The authenticity of this tabulation is not challenged in appellant's jurisdictional statement.

In 1967 the Mississippi State Board of Health adopted §11 of the regulations. The adoption thereafter waived application of the cited standards for domestic producers, *supra*, to sister state producers in favor of reciprocal agreements. Under §11 the following dairies export milk into Mississippi under a reciprocal inspection agreement:

*ALABAMA	Dixie Dairies, Inc., Prichard, Alabama Barber Pure Milk Co., Mobile, Alabama
ARKANSAS	Dean Milk Co., Conway, Arkansas
FLORIDA	Reddi-Wip Co., Jacksonville, Florida
GEORGIA	Sealtest Foods, Atlanta, Georgia
KENTUCKY	General Dairy Service, Murray, Kentucky
*LOUISIANA	Borden Co., Franklinton, Louisiana Borden Co., New Orleans, Louisiana Sealtest Dairy Products, New Orleans, Louisiana Superbrand Dairy Products, New Orleans, Louisiana
MICHIGAN	Michigan Prod. Dairy Co., Sebewaing, Michigan
MISSOURI	Mid-America Dairymen, Inc., Lebanon, Missouri Sealtest Foods, St. Louis, Missouri

TENNESSEE	Dairymen, Inc., Nashville Div., Lewisburg, Tenn.
	Midwest Farms, Memphis, Tennessee
	Sealtest Foods, Memphis, Tennessee
	Dean Foods, Co., Memphis, Tennessee
	Turner Dairies, Covington, Tennessee
WISCONSIN	Dean Foods Co., Janesville, Wisconsin
	Bancroft Dairy, Madison, Wisconsin

Louisiana's health authorities were not before the District Court because of the proscriptions of Rule 4, Federal Rules of Civil Procedure. At the conclusion of the hearing the District Court invited memoranda on the question of whether Louisiana officials could be joined. Both parties agreed that such a step was impossible and the Court so held. *Great A & P Tea Company* v. *Cottrell, supra,* p. 569. The Court properly recognized that "if the reciprocity clause could be said to be retaliatory in nature the guilty party is Louisiana not Mississippi." *Id.* at p. 576.

Revealing evidence of Louisiana's policy was contained in the letter of Dr. Ramson K. Vidrine, Louisiana's State Health Officer. [*Original Stipulation,* Exhibit II] As he articulated Louisiana's policy, that state refuses to accept milk which does not meet Louisiana standards:

> "At present we are not receiving out-of-state processed milk from Mississippi, a state of particular concern to you, because the milk does not meet our standards. . . . Again, we have no objection to importation of milk into Louisiana so long as it meets the same standards we require of intrastate producers and processors. Louisiana has not entered reciprocity agreements with any state." [*Original Stipulation,* Exhibit II]

Louisiana's policy, authoritatively articulated through Dr. Vidrine, is at war with the commerce clause. Moreover, there is no factual support for the proposition that Mississippi milk does not meet Louisiana's written standards. Dr. Vidrine has adopted the policy against reciprocal agreements despite a statutory policy in Louisiana favoring reciprocal agreements: "The State Health Officer may accept the certificate of inspection of a duly authorized government representative, agent, or agency of such other state wherein such products are produced." [Para. 5.B.1., Exhibit J, *Original Stipulation,* Chapter 5, Milk, Milk Products and Manufactured Milk Products Regulations, January 28, 1968, p. 6]

ARGUMENT

I. Reciprocity of Inspection Standards and Inspection Results As an Alternative to Extraterritorial Inspections or Excise Taxes on Producers Does Not Unconstitutionally Burden Interstate Commerce.

The regulation at issue here is plain and unequivocal:

> "Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U. S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and pro-

cessed in Mississippi on a reciprocal basis. . . ." (Regulations Governing the Production and Sale of Milk and Milk Products, Section 11)

The regulation does not say without more that Louisiana milk is barred from export to Mississippi unless Mississippi milk can enter Louisiana. Appellant maintains in its jurisdictional statement that Part One of the regulation respecting inspection standards is constitutional while reciprocity is not. [Jurisdictional Statement of Appellants, p. 7] Of course, the regulation is not severable for two interrelated sets of reasons.

First, the health requirements of Part One and the reciprocity requirements of Part Two are inextricably bound up with each other. §11 covenants that Mississippi will do the inspections, will certify them, and will accept a standard below that applicable to domestic producers if the forwarding state will do the same. Second, Parts One and Two are not severable because severability would allow a lesser standard of health and sanitation for domestic producers than out-of-state producers. The commerce clause does not require that Mississippi affirmatively disadvantage domestic producers in a way which might offend the Equal Protection Clause of the Fourteenth Amendment. Finally, the appellant is incorrect when he says that A & P meets all the health related requirements of the Mississippi regulation. Absent reciprocity, which Louisiana stoutly refuses to grant, the substantial equivalency standard in the regulations is *exact compliance* with Mississippi's standards for domestic producers.

A & P's milk from the Kentwood plant is, therefore, not barred by its failure to meet the health requirements of Part One of §11, but by its failure to comply with standards for domestic processors set out at p. 8, *supra*. A & P evinces a misunderstanding of this when they represent

that "A & P has complied with all health related requirements of the milk regulation, within the meaning of §11." Absent on-site inspections of the Kentwood plant, which have not taken place (Testimony of Clinton Van Devender, Transcript of Testimony on Motion for Preliminary Injunction, p. 6), and Louisiana's proven shortfall in its own regulations below that of Mississippi's, A & P's milk does not meet the health requirement. Because of the nonseverability of §11, A & P cannot have its milk judged according to the relaxed standards of §11. As to the domestic standards which for nonreciprocating states become "substantial equivalency", A & P did not allege or prove compliance with these standards and is, therefore, barred by them since compliance is not evident.

These Mississippi health and safety standards, *supra*, are valid and constitutional as apply to milk originating outside the police jurisdiction of Mississippi. These regulations would not be forbidden even though they might affect interstate commerce because they are rationally related to a state's legitimate objects of regulation. *United States* v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1943). States have wide latitude in their exercise of police power over facilities for handling milk. *H. P. Hood & Sons* v. *Dumond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948). The pertinent Mississippi regulations are protective measures for the health, safety, and welfare of its citizens and may constitutionally be relied upon. *Florida Lime and Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

Louisiana's failure to execute a reciprocity agreement prevents any part of §11 from being applied to Louisiana processors. The health and reciprocity features of §11 plainly interface with each other. By its failure to enter into reciprocity, Louisiana is saying that it will not on a

reciprocal basis accept the validity of Mississippi inspections and Mississippi ratings. There is a valid health related purpose in one state conceding that a sister state is making a believable and proper health inspection of milk. The overriding health related feature of §11 is the exchange of milk upon equivalent standards which are not necessarily chosen by each state but are a compromise.

That reciprocity and substantial equivalency of regulation go hand-in-hand is self-evident. The substantial equivalency standard of §11 insures both similar standards of inspection and of equal importance, similar execution of the inspections. Thus the substantial equivalency standard goes to the entire milk inspection procedures and *practices* utilized by a sending state. If Louisiana will not give trust and reliance to Mississippi's conduct of the inspections, then Mississippi is loath to accept the same Louisiana procedures, out of a regard for the health and welfare of her own citizens.

There is testimony that as of the November 6, 1972, date of the hearing on motion for preliminary injunction Mississippi accepted the 90 percent rating and the substantial equivalency of Louisiana regulations. But §11 imposes a continuing dual health requirement that requires ongoing supervision and continuing vigilance. "(1) The milk must be produced, pasteurized, and labeled under regulations which are substantially equivalent to this regulation, and (2) have been awarded an acceptable milk sanitation compliance rating of 90 percent or above. . . ." Failure of Louisiana to reciprocate gives rise to apprehension that continued inquiry by Mississippi authorities into the substantial equivalency of Louisiana regulations would be justified. This is true in a context where the substantial equivalency standard runs to the entire milk inspection procedures and practices utilized by a sending state. The

decision to accept the substantial equivalency of Louisiana's procedures is a pure health consideration which is made easier and more palatable where the sending state will reciprocate.

The adoption of §11 was a generous waiver of Mississippi's strict inspection requirements to facilitate trade. The effect of the provision as found by the District Court has been to lower trade barriers and create an open market for milk in the State of Mississippi. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* pp. 575-576. These findings are certainly not clearly erroneous. As to the claim that there has been an actual interference with the whole flow of interstate commerce, it clearly fails for want of proof. As this Court recently remarked in a totally different context but to similar effect, "On the record in this case, however, the conclusion of the District Court that no such circumstances existed here cannot be considered erroneous." *Gulf Oil Corp.* v. *Copp Paving Co.*, ... U.S. ....., 95 S.Ct. ....., 42 L.Ed.2d 378 (1974).

Certainly the Mississippi regulation affects commerce and with respect to Louisiana processors affects it in a substantial way. But the effect on commerce is the inverse of what the appellant says. Manifestly, the effect of the regulation has been to open free and unfettered trade in milk. While appellant says the provision favors local processors and opens foreign markets for local businessmen (Jurisdictional Statement, p. 8), the true effect of the rule is to disadvantage local processors. In point of fact, §11 aids the free flow of milk, and to this the appellant A & P agrees:

> "Reciprocity, by eliminating hypertechnical standards peculiar to one state, may aid the flow of milk." Jurisdictional Statement, p. 9.

All of the authorities relied on by the appellant are inapposite. They involve trade barriers—whether directed to price, area, or quantity discrimination—which are transparently protectionist in design and result. *Polar Ice Cream & Creameries Co.* v. *Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964), struck down a state regulatory scheme which required Florida distributors to purchase only from local milk producers. Foreign milk could enter the market only if there was an additional need. This was pure protectionism. Of similar import are the cases involving price differentials which effectively secure a preference for domestic producers. *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1934). To the same effect are this Court's cases on geographical or territorial discrimination in milk ordinances. *Dean Milk Company* v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951).

The discriminatory regulations in these cases, touching price, quantity, and area discrimination, were unequivocal. A willing producer could not surmount them by meeting other standards. There was no safety valve such as the Mississippi scheme here at issue.[1] These standards are

---

1. The A & P milk produced at Kentwood, Louisiana, is technically eligible for shipment to Mississippi if it meets the health regulations applicable to domestic producers. Compliance with such standards would, of course, have to come about by means of out-of-state inspections of Louisiana dairies and processing plants by Mississippi authorities. Such inspections are not presently being conducted. Mr. Clinton Van Devender, Mississippi's Supervisor of Milk Sanitation Control, testified that he did not know whether milk processed in A & P's Kentwood plant met the State Board of Health's minimum standards for domestic producers: "We wouldn't know, because we have no cause as to whether they would or not." When asked to explain, he stated, "We haven't made any inspections of the plant or of the dairies involved in the milk supply. . . ." [p. 3, Testimony of Clinton Van Devender, Exhibit F, *Original Stipulation*]

Mr. Van Devender also explained the relationship between reciprocity and out-of-state inspections:

(Continued on following page)

justifiable in the interest of the public, and the means for their enforcement are reasonably necessary for the accomplishment of a proper purpose, namely, safe and wholesome milk. *Lawton* v. *Steel*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894).

Mississippi's milk sanitation and health requirements for domestic producers were and are applicable to out-of-state processors without a §11 reciprocity agreement. The milk produced by the Great A & P Tea Company of Louisiana falls short of those requirements. Had

---

Footnote Continued—

"Q. And without a reciprocity agreement then you would have to make an inspection of that milk at their plant or a plant of a producer and the originating plant?

A. Yes, sir, and the producers.

Q. So it would necessitate your having to enforce in the other states to do those things?

A. Yes, sir.

Q. What is the primary purpose in having the reciprocity agreement?

A. To prevent the necessity of going into those states and making inspections and being assured that they meet our standards." [pp. 6-7, Testimony of Clinton Van Devender, Exhibit F, *Original Stipulation*]

A & P has not alleged or proved that the milk at the Kentwood plant meets all standards applicable to domestic producers. While one might draw the inference from the supplemental stipulation that such might be the case, the important point is that without reciprocity, Mississippi must make the determination of qualification itself, just as it does for domestic dairies. Acceptance of reciprocal inspections and inspection standards allows Mississippi to credit both what Louisiana officials and the U. S. Department of Public Health report about the Kentwood plant instead of making continuing on-site inspections.

Without on-site Mississippi inspections and absent proof that Louisiana's milk meets Mississippi's domestic standards, the primary hurdle which A & P must cross is the more stringent standards of the State of Mississippi. This could come about only by the requisite inspections in Louisiana by Mississippi officials. Mr. Van Devender's testimony indicates that expense would be the primary factor inhibiting such out-of-state inspections. Of course, Louisiana would have to permit such inspections, as would the producer involved.

§11 never been passed, the State of Mississippi could, in conformity with the commerce clause of the Constitution, take whatever steps were necessary to enforce these exacting requirements. Mississippi could levy a nondiscriminatory excise tax upon out-of-state producers sufficient to defray the cost of additional inspections for trans-shipped milk. It could also require that on-site out-of-state inspections be conducted by its own inspectors as a prerequisite to entry to Mississippi markets. *Dixie Dairy Co.* v. *City of Chicago*, 355 F.Supp. 1351 (N.D. Ill., 1973). Both these devices, reasonably applied, would not offend the commerce clause. As a third alternative, Mississippi has opted for a reciprocal inspection system which obviates the financial burden of inspections or taxes. If the State of Mississippi could do the former it seems on principle entirely valid that she do the latter.

Section 11 clearly meets the balancing test this Court has ordained in commerce cases. The burden imposed by §11 is clearly not excessive in relation to the putative local interests. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). Where §11 clearly produces far-ranging free trade in milk with respect to other sister states, this Court cannot say that the regulation serves provincial local interests. Further, the benefits enjoyed by the State of Mississippi in avoiding costly out-of-state inspections should be weighed in the balance. The focus clearly should be on interstate commerce in milk through Mississippi with respect to all sister states and not the business interests of the Great A & P Tea Company of Louisiana, which set up its Kentwood processing facility in either disregard of or ignorance of applicable Mississippi regulations.

Mississippi's §11 regulation is a reasonably nondiscriminatory alternative to barriers that would result from

application from Mississippi's own domestic requirements to foreign producers. There is no purer example of such barriers than Dr. Vidrine's explanation of Louisiana's trade barrier in milk. §11 is a proper regulatory bypass of strict adherence by each state to its own exacting standards. In exactly the way envisioned by *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), Mississippi has opted for accepting substantially equivalent regulations of a sister state rather than charging the actual and reasonable cost of out-of-state inspections to importing producers. *Dean Milk, supra,* approved this approach, and Mississippi has accepted the invitation with the proviso the forwarding state accept Mississippi ratings and equality of Mississippi's regulations.

The additional requirement of reciprocity is consistent with *Dean Milk* and its family of cases. The practical effect of Mississippi's regulation is one which satisfies this Court's standards for a justifiable indirect burden upon commerce. First, Mississippi has opened its borders by its policies and has not "placed itself in a position of economic isolation." *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032. Second, in dealing with a commodity like milk, Mississippi has conditioned importation upon "fitting standards of sanitation. . . ." Those fitting standards are to waive its own strict requirements and replace them with a regime under which believable sister state inspections and inspection ratings up to 90 percent of the federal standard are enough if the forwarding state will agree.

Reciprocity, as conceived and operated by Mississippi health authorities, preserves both free trade in milk and protection of the health and safety of the state's inhabitants. Through reciprocity a minimum of indirect interference with interstate commerce results. As in the case

of Louisiana, Mississippi's policy only results in an obstruction of trade where a sister stat adopts avowedly nonstatutory and unconstitutional policies to protect local dairies. While Louisiana is not a party defendant, this Court cannot overlook Louisiana's stubborn policies as Court balances the effect upon all commerce.

With mutual exchanges of standards of inspection under §11, Mississippi does not appreciably burden interstate trade. Such incidental or indirect burden as that which afflicts A & P, *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752, does not appreciably burden interstate trade. Interstate commerce in milk is a two-way street. Mississippi's regulations presuppose that foreign states will accept her milk, and §11 provides a basis for that acceptance.

Mississippi's policy cannot be judged by the interruption which a foreign state's recalcitrance produces. In other words, but for Louisiana's policy, Mississippi's regulation would serve valid health purposes and valid relaxed regulatory requirements. But Louisiana's obstinate policies jam the interstate machinery.

Appellant argues access to interstate commerce cannot be conditioned upon the action of some other state. This Court's authority is to the contrary. In *Mintz* v. *Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245 (1933), the State of New York required that every interstate shipment of livestock be accompanied by a certificate from the sending state's chief sanitary officer that the cattle and their herds were free from Bangs disease. The Court held that the order was an appropriate inspection measure to prevent further spread of disease. This Court implicitly ruled that the rights of private parties might hinge upon the actions or inaction of government bodies. Of course, A & P could have had redress in the State or Federal

Courts against Louisiana officials both for commerce clause reasons as well as grounds under the applicable Louisiana health statutes. If A & P is being prejudiced by the actions of Louisiana health officials it should direct its complaints there.

II. This Court Lacks 28 USC §1253 Jurisdiction of the Appeal Concerning Those Out-of-State Processors Who Were Grandfathered in When §11 Was Adopted; the Order Appealed from, Properly Considered, Does Not Deny an Injunction Concerning a Specific State Statute or Regulation Concerning Grandfathered Dairies; Alternatively, There Is No Jurisdiction Because A & P Has No Standing to Challenge the Shipping of Milk by Other Out-of-State Dairies.

The presence of any issue concerning access to Mississippi markets by other out-of-state processors is a mystery. The original complaint for a declaratory judgment and injunctive relief does not raise the issue. No amended pleading does so. The grandfather clause treatment did not relate to §11, the only statute or regulation under attack. No relief was asked concerning any previous statute or regulation in existence before §11 which might have provided authority for other dairies to enter, nor was any such statute adduced by appellant. Yet, A & P in the "Questions Presented" portion of its jurisdictional statement states as follows:

> "A related question is whether Mississippi enforcement policy, allowing certain Louisiana milk processors to export into Mississippi but denying that right to A & P unconstitutionally deprives A & P of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution." [Jurisdictional Statement, p. 4]

This issue was injected into the case quite by accident. At the hearing on motion for preliminary injunction on November 6, 1972, counsel for the appellee Dr. Cottrell introduced a document showing those dairies who were shipping under §11 reciprocal agreements. [Exhibit F, p. 10, *Original Stipulation*] The document containing this information also showed that four dairies in Louisiana and two in Alabama were grandfathered into the state at the time §11 was adopted. A & P did not further explore the issue.

One year elapsed between the November 6, 1972, hearing and the hearing on merits. A & P, having learned of the access to Mississippi by other Louisiana dairies, filed no amended pleading and undertook no further discovery. In fact, it is quite clear that the only use A & P made of these grandfather clause regulations was to argue in the Trial Court, as they did in their jurisdictional statement (Jurisdictional Statement, p. 5) that A & P met all the health related requirements Mississippi imposed because certain other out-of-state dairies which were not inspected could ship into Mississippi. Of course, this reasoning pales before the explanation that A & P is barred not by the §11 health standards but by the standards applicable to domestic producers. *Supra*, p. 8. But as far as the pleadings, testimony, and stipulations are concerned, there is no factual development by A & P of the policies and practices underlying these grandfather regulations or their source in state law.

A & P has not sought to learn under what regulations or policies the grandfathered in dairies who have shipped into Mississippi before 1967 were continued. That, of course, bears materially upon whether they have sought an injunction against a state statute or regulation of statewide import

by reason of its unconstitutionality or whether such an injunction has been denied under 28 USC §2281. The only record fact which even tangentially bears upon the grandfather regulations is that no inspections are conducted outside Mississippi. It does not appear of record what health standards are applied to these grandfathered in dairies, or under what regulation they were admitted. There is no record on whether any reciprocal arrangements were a part of these grandfather clause regulations. As to Louisiana, it is clear that reciprocity was no part of the grandfathered in dairies since Mississippi processed milk cannot enter Louisiana. (Testimony of Clinton Van Devender, p. 7, Exhibit F, *Original Stipulation*) Finally, it is not shown that access under the grandfather clause is necessarily statewide access. In other words, the grandfathered regulations may have granted access to certain counties, not the whole state.

On this state of facts, the District Court treated the incipient claim against the grandfather clause regulations as a substantive claim for relief. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* p. 576. The Court held the rule did not violate equal protection. Conceding that the reciprocal agreement feature of §11 was valid, the court felt enjoining it because of the grandfather clause regulations would have barred the imposition of a valid reciprocity policy at any time in the future to any dairies in states where some dairies had been grandfathered in. A & P simply could not have through the back door what it could not obtain through the front.

At a minimum this Court lacks jurisdiction of the appeal over the issue of grandfather clause regulations. Whether this is a 28 USC §1253 appeal depends, in turn, on whether a Three Judge Court was properly convoked to hear that issue. *Moody* v. *Flowers*, 387 U.S. 97, 87 S.Ct.

1544, 18 L.Ed.2d 643 (1967).[2] At the outset the equal protection claim concerning the grandfather clause regulations was not properly before the Three Judge Court. It was clear that the grandfather clause processors did not enter the state by virtue of or under the auspices of §11. A different and previous regulation or policy was the source. This is clear from the very language of §11. No statute or regulation embodying the grandfather clause policy was before the Court. Given the void in the evidence concerning the source or application of the grandfather clause regulations sustaining a §1253 appeal concerning it would be to take jurisdiction where none affirmatively appears.

One cannot tell from the pleadings, the opinion of the Court, or the jurisdictional statement exactly the relief A & P wants concerning the grandfather clause. If they are attacking the grandfather clause policy it would appear that an injunction would merely bar enforcement of that policy further. This would strip the grandfathered in dairies of their access but would not affirmatively benefit A & P. In that posture any jurisdiction of such a claim

---

2.

§2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

would fail, since A & P has no direct interest in merely disadvantaging its competitors without obtaining any affirmative benefit for itself. *Golden* v. *Zwickler,* 394 U.S. 103, 110, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). Couched in that way the requested relief would not obtain any protection for A & P against actual interference with their rights. *United Public Workers of America* v. *Mitchum,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). If proscription of the grandfather policy is at issue, A & P is clearly before this Court urging someone else's lawsuit. To take access by means of interstate commerce away from competitors places A & P in the position of urging less constitutional protection for everyone. It does not undo allegedly unconstitutional conduct with respect to A & P.

To the contrary, if A & P is suggesting that it is entitled to a mandatory injunction to obtain entry for her milk because of the claimed equal protection violation as to the grandfathered dairies theory, then it is not challenging §11 as to constitutionality. §11 says not a word about grandfathered dairies. Such dairies as were grandfathered were continued in existence under predecessor regulations, not §11. Hence, there is no Three Judge case. *Public Service Commission* v. *Wycoff,* 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952); *Bailey* v. *Patterson,* 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962).

A Three Judge case and a proper §1253 appeal also are lacking on A & P's assertion that the grandfather treatment is nonstatutory and therefore ultra vires. At page 12 of the Jurisdictional Statement, A & P says "At no time has Mississippi proffered any state legislative act to permit such grandfather treatment." This says that the policy is followed without statutory approval and, therefore, the attack on it cannot be a challenge to the constitutionality of a state statute. Note that the appellant does not say that

the grandfather regulation takes place under a state legislative enactment but merely exceeds that authority. *Frasier* v. *Board of Trustees of University of North Carolina,* (D.C. of N.C., 1955) 134 F.Supp. 589, aff'd without op. 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956) A & P affirmatively says that there is no such statute. Therefore, A & P's claim against the grandfather policy does not attack a state statute or policy thereunder. *Phillips* v. *U. S.,* 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *Moody* v. *Flowers, supra.*

The order denying A & P relief on its equal protection claim is not an order denying an injunction against a state statute. A & P did not seek an injunction against the enforcement of the grandfather policy so much as they appear to be asking the Court, for the first time on the appellate level, to mandamus the state authorities to grant A & P the same privileges as the grandfathered in dairies. Since a prohibitory injunction would not have availed A & P of any benefits, the Three Judge Court's resulting decision against A & P is in the nature of a declaratory judgment. A & P did include in its original prayer for relief a prayer for a declaratory judgment that Mississippi's policy under §11 violated the commerce clause.

On the extravagant assumption that this Court might treat the grandfather policy as intrinsically related and ancillary to the Three Judge issue, the District Court's holding on the equal protection question is in the nature of a declaratory judgment which is not directly appealable pursuant to §1253. *Rockefeller* v. *Catholic Medical Center,* 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970). Since a favorable decision for A & P on the equal protection claim could not have granted them access to Mississippi markets, by the same token the District Court's unfavorable ruling did not deny them coercive relief. This makes the matter nonappealable under 28 USC §1253.

Finally, there is no warrant for considering the equal protection claim, ambivalent as it is, as pendent to the §11 claim. *Perez* v. *Ledesma,* 401 U.S. 87, 91 S.Ct. 674, 27 L.Ed. 2d 701 (1971). The equal protection claim turns on different facts, questions different regulations, though they are not identified, and does not require relief of a constitutional nature. There are clearly two claims—one against the enforcement of §11 turning on a constitutional challenge grounded in the commerce clause and another against pre-§11 grandfather treatment for dairies importing milk as of the date §11 was adopted. The relief as to the §11 claim would strike down enforcement of a state policy; relief on the equal protection claim if it were to be effective relief, would mandatorily add to a pre-existing state policy. As *Ledesma* ruled, "Even where a Three Judge Court is convened to consider one controversy between two parties, the parties are not necessarily entitled to a Three Judge Court and a direct appeal on other controversies which may exist between them." *Perez, supra,* 401 U.S. at 87, 88, 27 L.Ed.2d at 706.

CONCLUSION

§11 of Mississippi's milk regulations is a free trade provision both in purpose and effect. Such indirect burden as it visits upon the Great Atlantic & Pacific Tea Company of Louisiana is merely an indirect burden upon commerce produced by the recalcitrance of officials from a sister state. Mississippi is clearly within its province to adopt a reciprocal inspection program, for valid health reasons, as opposed to the adoption of excise taxes to support out-of-state inspections.

As to the belatedly raised equal protection claim, this Court is without jurisdiction to hear the matter, which should be heard by the United States Court of Appeals.

Appellee submits that the appeal from the judgment of the District Court denying all relief should be dismissed or, in the alternative, that the judgment and opinion upon which it is based should be affirmed without further briefing and argument.

Respectfully submitted,

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

By: HEBER LADNER, JR.

Supreme Court, U. S.
FILED
JUN 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,

Appellant,

versus

HUGH B. COTTRELL, M.D., HEALTH OFFICER,
STATE OF MISSISSIPPI,

Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi

BRIEF FOR THE APPELLANT

SAMUEL LANG
Kullman, Lang, Inman
& Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160

COUNSEL FOR APPELLANT
THE GREAT ATLANTIC
& PACIFIC TEA COMPANY, INC.

June 28, 1975

INDEX

Page

Opinions below 1

Jurisdiction 1

State Regulation involved 2

Questions presented 3

Statement 3

Argument:

I. Section 11 imposes an unconstitutional burden on interstate commerce 5

II. Section 11, as applied, violates the guarantee of equal protection of the law 7

Conclusion 8

Certificate of Service 9

TABLE OF AUTHORITIES

Cases:

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1934) 5

Dean Milk Company v. City of Madison, Wisconsin, 340 U.S. 349 (1951) 6

Hood & Sons v. DuMond, 336 U.S. 525 (1949) 6

McGowan v. Maryland, 366 U.S. 420 (1961) 7

Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939) 5

Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) 5

TABLE OF AUTHORITIES (Continued)

Page

Statutes:

28 U.S.C. §1331 1

28 U.S.C. §2201 1

28 U.S.C. §2281 2

Section 4560-14, Mississippi Code of 1942, as amended 2

"Regulation Governing The Production And Sale Of Milk And Milk Products," Section 11 .....passim

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,

versus

HUGH B. COTTRELL, M.D., HEALTH OFFICER, STATE OF MISSISSIPPI,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The single-judge opinion of the United States District Court for the Southern District of Mississippi (Jurisdictional Statement, page 1a) is unreported. The opinion of the three-judge court (Jurisdictional Statement, page 8a) is reported at 383 F.Supp. 569.

JURISDICTION

This suit was brought pursuant to Sections 1331 and 2201 of Title 28 of the United States Code by The Great Atlantic & Pacific Tea Company, Inc. (hereinafter

referred to as A&P or Appellant) against Hugh B. Cottrell, M.D., Health Officer, State of Mississippi (hereinafter referred to as Mississippi). The three-judge court, constituted under 28 U.S.C. §2281, rendered its opinion on October 28, 1974, denying the relief. Judgment was entered on November 13, 1974, and Appellant filed its Notice of Appeal to this Court on December 11, 1974. Probable jurisdiction was noted on May 12, 1975.

STATE REGULATION INVOLVED

Section 4560-14 of the Mississippi Code of 1942, as amended, authorizes the Mississippi State Board of Health to enact regulations of state-wide force concerning inspection of milk and milk products sold in the state. Pursuant to that authority, in 1967 the Mississippi State Board of Health enacted Section 11 as follows:

> Section 11. MILK AND MILK PRODUCTS FROM POINTS BEYOND THE LIMITS OF ROUTINE INSPECTION
>
> Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, and Provided *further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis. . . .* (Regulations Governing the Production and Sale of Milk and Milk Products, Section 11, emphasis added.)

QUESTIONS PRESENTED

May the State of Mississippi, consistent with the Commerce Clause, deny A&P the right to export into Mississippi milk fully satisfying Mississippi's health standards solely because the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi? A related question is whether Mississippi enforcement policy, allowing certain Louisiana milk processors to export into Mississippi but denying that right to A&P, unconstitutionally deprives A&P of the equal protection of the laws in violation of the Fourteenth Amendment.

STATEMENT

A&P processes milk and other dairy products at its Kentwood, Louisiana, plant for delivery to its retail stores in Louisiana and Mississippi. Much of the raw milk processed at the plant comes from Mississippi producers.

The investment in the Kentwood plant was made specifically in anticipation of exporting processed milk into A&P's retail stores in Mississippi. A&P's investment in the Kentwood plant exceeds one million dollars and throughout much of these proceedings A&P has suffered actual irreparable losses of up to

$2,500.00 per week because of the refusal of Mississippi officials to allow milk from the Kentwood plant into Mississippi.

A&P has complied fully with all health related requirements of the Mississippi Regulation, within the meaning of Section 11. Since Mississippi's health officials refused to inspect A&P's plant and the milk processed there, they cannot know whether their state's standards for domestic producers could be or are being met. Moreover, those standards which are imposed on Louisiana processors currently distributing milk in Mississippi are the same by which A&P is tested.

The sole reason milk from the Kentwood plant has not been accepted in Mississippi is that the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi. Mississippi offers to accept imported milk meeting Louisiana standards (but not necessarily meeting Mississippi standards) if Louisiana will reciprocate. But, Mississippi does not stop there. Instead of merely refusing to waive its own standards when Louisiana refuses to do so, Mississippi totally bans importation of milk from states not having reciprocity agreements regardless of the milk's quality, except as listed below. As a result, Louisiana milk is rejected by Mississippi even though it has never actually been judged against the standards required of Mississippi milk.

Mississippi does accept milk from Louisiana processors such as Borden Co., Franklinton; Borden Co., New Orleans; Sealtest Dairy Products, New Orleans; and Superbrand Dairy Products, New

Orleans; which were importing milk into Mississippi prior to the adoption of Section 11 in 1967. These Louisiana processors are allowed to export milk to Mississippi without a reciprocity agreement, and without Mississippi inspection.

ARGUMENT

I. Section 11 imposes an unconstitutional burden on interstate commerce.

Mississippi passed a sanitary code which includes a section on the importation of milk. The regulation establishes two requirements: (1) out-of-state milk must be processed under regulations substantially equivalent to Mississippi's Regulation (which contains detailed health standards), and (2) the exporting state must have signed a reciprocity agreement with the State of Mississippi. The first requirement, which serves to protect the health and safety of Mississippi residents, is constitutional. The second requirement, which conditions the right of A&P to engage in interstate commerce upon some action by Louisiana, is not.

A state may not burden the free flow of interstate commerce. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964). However, reasonable legislation, which an enacting state demonstrates is designed to protect the health and safety of its citizens, may incidentally burden the free flow of interstate commerce. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1934). Here, the necessary result of Section 11 — protecting the economic welfare of state

businessmen from foreign competition or insuring the access of state businessmen to foreign markets — though published uner the guise of a safety and health measure, is not a legitimate exercise of a state's police power. *Dean Milk Company v. City of Madison, Wisconsin*, 340 U.S. 349 (1951); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

The actual effect of the Mississippi reciprocity rule demonstrates the transparency of Mississippi's argument that the rule is intended to insure the wholesomeness of imported milk. The reciprocity agreement permits Mississippi to waive its requirements if Louisiana will waive its standards for imported Mississippi milk. Since Mississippi argues that its health standards are stricter than those imposed in Louisiana, the result of the reciprocity rule would be to *lower* the standards for imported milk if the exporting state will agree to a political arrangement desired by the State of Mississippi. Any contention that this reciprocity provision, allowing *lower* milk standards, ensures a more sanitary supply of milk is frivolous.

On the other hand, if Louisiana's milk is processed under standards more stringent than those in effect in Mississippi. Mississippi's insistence on a reciprocity agreement (with the consequent right to export milk to Louisiana) and Louisiana's accession would result in *less* healthful milk for Louisiana citizens. In either case, the regulation creates an overt and substantial obstruction to the free flow of interstate commerce without regard to wholesomeness.

Mississippi may grant an importer the privilege of importing milk that does not meet the Mississippi standards, while meeting its own state's standards, on the condition that the exporting state will reciprocate. If the exporting state refuses to reciprocate, then Mississippi may refuse to extend this privilege, and may insist that the out-of-state milk meet Mississippi's own stricter standards. In the absence of a reciprocity agreement, Mississippi must inspect out-of-state processors where, as here, there has been an offer to pay reasonable expenses, or suffer a permanent injunction against the enforcement of the reciprocity provision.

Mississippi cannot defend Section 11 by arguing that the Louisiana practice is invalid, and by further arguing that Mississippi will not abide by the Constitution unless Louisiana first agrees to. The Appellant is A&P, not Louisiana. A&P has no control over Louisiana or what regulations that state adopts. A&P brought suit against Mississippi, and it is that state which should be enjoined from acting unconstitutionally.

II. Section 11, as applied, violates the guarantee of equal protection of the law.

In deciding whether or not Section 11 violates the Equal Protection Clause of the Fourteenth Amendment, the test is whether the regulation is rationally suited to achieve a lawful objective of the state. *McGowan v. Maryland*, 366 U.S. 420 (1961). Measured by this standard, Section 11, as applied, violates the Fourteenth Amendment.

Mississippi allows the importation of milk from at least four Louisiana dairies even though that milk does not meet Mississippi's standards for domestic processors and even though Louisiana has not signed a reciprocity agreement. Mississippi offers no justification for this anomaly.

More importantly, no rational basis, associated with protection of a wholesome supply of milk, could be advanced. Louisiana milk, supposedly inferior to Mississippi's milk, is being consumed in Mississippi without that state's inspection. This practice is further evidence that the real aim and exclusive effect of the reciprocity rule is not health; but, rather, is a protectionist scheme for the economic well-being of Mississippi dairy processors.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's judgment.

Respectfully submitted

SAMUEL LANG
Kullman, Lang, Inman
& Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I have this ____ day of June, 1975, mailed three copies of the foregoing Brief for the Appellant by certified mail, return receipt requested, postage prepaid to Mr. A. F. Summer, Attorney General, State of Mississippi, Post Office Box 220, Jackson, Mississippi 39205 and to Mr. Heber A. Ladner, Jr., Suite 1638, Capital Towers, Jackson, Mississippi 39205.

Supreme Court, U. S.
FILED
AUG 22 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,

vs.

HUGH B. COTTRELL, M. D., HEALTH OFFICER, STATE OF MISSISSIPPI,
Appellee.

BRIEF OF APPELLEE

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Questions Presented 1

Statement of the Case 2

Argument 8

I. Reciprocity of Inspection Standards and Inspection Results As an Alternative to Extra-territorial Inspections or Excise Taxes on Producers Does Not Unconstitutionally Burden Interstate Commerce 8

II. This Court Lacks 28 USC §1253 Jurisdiction of the Appeal Concerning Those Out-of-State Processors Who Were Grandfathered in When §11 Was Adopted; the Order Appealed From, Properly Considered, Does Not Deny an Injunction Concerning a Specific State Statute or Regulation Concerning Grandfathered Dairies; Alternatively, There Is No Jurisdiction Because A & P Has No Standing to Challenge the Shipping of Milk by Other Out-of-State Dairies 22

Conclusion 28

Table of Authorities

Cases

Bailey v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962) 26

Baldwin v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1934) 13, 20

Dean Milk Company v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) 13, 14, 19, 20

Dixie Dairy Co. v. *City of Chicago*, 366 F.Supp. 1351 (N.D. Ill., 1973) 16
Florida Lime and Avocado Growers, Inc. v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) 10
Frasier v. *Board of Trustees of University of North Carolina*, (D.C. N.C., 1955) 134 F.Supp. 589, aff'd without op. 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956) 27
Golden v. *Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969) 26
Great Atlantic & Pacific Tea Co. of La. v. *Cottrell*, 383 F.Supp. 569 (S.D. Miss., 1974) 2, 6, 7, 12, 24
Gulf Oil Corp. v. *Copp Paving Co.*, ... U.S. ....., 95 S.Ct. ....., 42 L.Ed.2d 378 (1974) 12
H. P. Hood & Sons v. *Dumond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948) 10
Huron Cement Co. v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) 19
Lawton v. *Steel*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894) 16
Milk Control Board v. *Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 20
Mintz v. *Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245 (1933) 21
Moody v. *Flowers*, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed. 2d 643 (1967) 24-25, 27
Parker v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) 17
Perez v. *Ledesma*, 401 U.S. 87, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) 28
Phillips v. *United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941) 27

Polar Ice Cream & Creameries Co. v. *Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964) 14, 15
Public Service Commission v. *Wycoff*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952) 26
Rockefeller v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970) 27
South Carolina Highway Department v. *Barnwell*, 303 U.S. 177, 58 S.Ct. 510, 83 L.Ed. 1124 (1938) 17
Southern Pacific Company v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) 17, 18
United Public Workers of America v. *Mitchum*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) 26
United States v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1943) 10

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES

Article I, §8, Clause 5, Constitution of the United States 2
Regulations Governing the Production and Sale of Milk and Milk Products, Section 11 .....2-4, 6, 8-12, 14-29
28 USC 1253 .....1-2, 22, 24, 25, 26, 28, 29
28 USC 2281 .....23, 25

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,

vs.

HUGH B. COTTRELL, M. D., HEALTH OFFICER, STATE OF MISSISSIPPI,
Appellee.

BRIEF OF APPELLEE

QUESTIONS PRESENTED

Whether a state may in conformity with the Commerce Clause of the United States Constitution coercively require reciprocity of inspection standards and results in preference to out-of-state inspection, or excise taxes to defray the cost of such inspection, where such policy promotes and was found to promote free trade.

Whether a processor denied access by the reciprocal requirement, may bring to this Court under 28 USC

§1253, a claim that equal protection was violated as to certain dairies grandfathered in if the grandfather regulations were not specifically attacked, no injunction restraining the enforcement of any state statute was requested in connection with the grandfather clause claim and Appellant A & P did not stand to benefit by any prohibitory injunction against the grandfather clause regulation.

STATEMENT OF THE CASE

On October 25, 1972, the appellant Great Atlantic & Pacific Tea Company, Inc. [hereafter A & P], filed this suit to invalidate §11 of the milk regulations of the Mississippi State Board of Health. That regulation requires that Mississippi health authorities accept the substantial equivalency of Louisiana's milk regulations and Louisiana's milk ratings of 90 percent or more if Louisiana will reciprocate as to Mississippi's milk in these same two undertakings. Mississippi has accepted Louisiana's regulations and ratings with respect to appellant A & P. Louisiana declines to reciprocate. Under the regulation Louisiana processed milk is then barred from Mississippi.

A & P alleges that Mississippi's requirement that Louisiana reciprocate in its ratings and standards of inspection for out-of-state processed milk infringes Article I, §8, Clause 5, of the Constitution of the United States. After hearing and the submission of extensive stipulations of fact, the Three Judge Court held that the challenged section of Mississippi's regulations was a warranted exercise of Mississippi's police power free from any constitutional infirmity. *Great Atlantic & Pacific Tea Co. of La.* v. *Cottrell*, 383 F.Supp. 569, Three Judge Court (S.D. Miss., 1974).

The District Court concluded that Mississippi's triple-edged requirements of (1) milk production and processing under substantially equivalent regulations by a sister state; (2) a milk rating of 90 percent or above according to U. S. Public Health Service standards; and (3) reciprocity of inspection ratings and inspection standards between sending and receiving states, were constitutional. The Court reasoned that the incidental or indirect burden upon commerce was overborne by specific proof that the application of Mississippi's regulation was free trade in design and effect. Sixteen dairies from nine states export milk to Mississippi under reciprocal agreements. The mutual exchange of inspection results and standards of inspection between sister states under §11 actually facilitates commerce in milk.

The Court found that Mississippi's policies had demonstrably opened free milk trade, lowered trade restrictions, and insured the enforcement of minimum health standards for milk originating out of state. The reciprocity created by §11 was viewed by the District Court as a reasonably nondiscriminatory alternative to on-site inspections of milk processing facilities outside the police jurisdiction of Mississippi or an excise tax on processors to defray the cost of these inspections. Accordingly, the complaint was dismissed on the merits. This appeal ensued.

In 1969 the Great A & P Tea Company of Louisiana leased from Dairymen, Inc., a dairy processing facility in Kentwood, Louisiana. That facility produces all the milk at issue in this case. According to the affidavit of Wade Buff, the Kentwood facility presently produces 2,903,000 gallons of milk ultimately sold within the State of Louisiana. The permit was sought for the excess capacity of approximately 750,000 gallons per year. After the plant was

acquired no production was had during 1970, nor during the first two calendar quarters of 1971. Serious production was begun in the Kentwood facility in 1972. [Exhibit G, pp. 2-4, *Original Stipulation*]

On August 28, 1972, three years after acquisition of the Kentwood facility, A & P sought a permit to distribute its Kentwood products in the State of Mississippi. [*Original Stipulation*, Exhibit IV] A & P failed to forward the requested reciprocal agreement certifying that Louisiana would accept the validity of Mississippi's inspections. Apparently A & P viewed the statement of Louisiana's Chief Health Officer that Louisiana had not entered reciprocity agreements with any states as a circumstance rendering compliance impossible. Thereafter A & P treated the September 18, 1972, letter from the Supervisor of Mississippi's Milk Control Program as a final denial and thereafter entered suit. [*Original Stipulation*, Exhibits II, V]

§11 is Mississippi's answer to the interruption in trade that results when states like Louisiana bar out-of-state processed milk. It is against the backdrop of the regulations applicable to domestic producers that §11 is best understood. Without §11, each state's different and exacting standards come into play. Because of milk's unique nutritional importance and susceptibility to contamination, its processing and pasteurization are subject to extremely exacting standards. [See Exhibit H, Regulation Governing the Production and Sale of Milk Products, Mississippi State Board of Health, *Original Stipulation;* and Exhibit J, Milk and Milk Products Regulations, Chapter V, Sanitary Code of the State of Louisiana, Louisiana State Board of Health] A categorical comparison between the applicable Louisiana and Mississippi inspection standards yields the following result:

Items	Louisiana	Mississippi	Interpretation
Imported Milk	May accept certification of inspection and supervision from other governmental agencies	Certification of reciprocity of inspection and supervision of sanitation and 90% or above sanitation compliance	Mississippi is equal to or exceeds Louisiana's requirements
Frequency of Tuberculosis Tests of Dairy Cattle	Six years	Three years	Mississippi exceeds
Lighting and Ventilation in Barns	Ten percent of floor area in windows	Eight square feet per stanchion	Mississippi exceeds
Lighting and Ventilation in Milk House	Ten percent of floor area in windows	Fifteen percent of floor area in windows	Mississippi exceeds
Pasteurized Milk Delivery Temperature	50° F.	45° F.	Mississippi exceeds
Frequency of Dairy & Plant Inspections	At least one per six months	At least four per six months	Mississippi exceeds
Abnormal Milk (Mastitis) Standard	No specific requirement shown in Louisiana Regulation	Maximum of 1,000,000 per ml. cell count per ml. of milk	Mississippi exceeds
Degrading or Permit Suspension for Violating Mastitis Tests	Three consecutive violations	Violation of three out of last five sample results	Mississippi exceeds
Frequency of Milk Sampling	None listed	At least four per six months	Mississippi exceeds

BEST COPY AVAILABLE

These line-by-line comparisons are drawn from Exhibits H and J, *Original Stipulation*. They reveal the basic differences between Louisiana's and Mississippi's domestic requirements. The District Court assumed, arguendo, that this chart was a true representation of the differences in health, production, and sanitation standards. *Great A & P Tea Co., Inc. v. Cottrell, supra,* p. 575. The authenticity of this tabulation is not challenged in appellant's jurisdictional statement.

In 1967 the Mississippi State Board of Health adopted §11 of the regulations. The adoption thereafter waived application of the cited standards for domestic producers, *supra,* to sister state producers in favor of reciprocal agreements. Under §11 the following dairies export milk into Mississippi under a reciprocal inspection agreement:

*ALABAMA	Dixie Dairies, Inc., Prichard, Alabama Barber Pure Milk Co., Mobile, Alabama
ARKANSAS	Dean Milk Co., Conway, Arkansas
FLORIDA	Reddi-Wip Co., Jacksonville, Florida
GEORGIA	Sealtest Foods, Atlanta, Georgia
KENTUCKY	General Dairy Service, Murray, Kentucky
*LOUISIANA	Borden Co., Franklinton, Louisiana Borden Co., New Orleans, Louisiana Sealtest Dairy Products, New Orleans, Louisiana Superbrand Dairy Products, New Orleans, Louisiana
MICHIGAN	Michigan Prod. Dairy Co., Sebewaing, Michigan
MISSOURI	Mid-America Dairymen, Inc., Lebanon, Missouri Sealtest Foods, St. Louis, Missouri

TENNESSEE	Dairymen, Inc., Nashville Div., Lewisburg, Tenn. Midwest Farms, Memphis, Tennessee Sealtest Foods, Memphis, Tennessee Dean Foods Co., Memphis, Tennessee Turner Dairies, Covington, Tennessee
WISCONSIN	Dean Foods Co., Janesville, Wisconsin Bancroft Dairy, Madison, Wisconsin

Louisiana's health authorities were not before the District Court because of the proscriptions of Rule 4, Federal Rules of Civil Procedure. At the conclusion of the hearing the District Court invited memoranda on the question of whether Louisiana officials could be joined. Both parties agreed that such a step was impossible and the Court so held. *Great A & P Tea Company* v. *Cottrell, supra,* p. 569. The Court properly recognized that "if the reciprocity clause could be said to be retaliatory in nature the guilty party is Louisiana not Mississippi." *Id.* at p. 576.

Revealing evidence of Louisiana's policy was contained in the letter of Dr. Ramson K. Vidrine, Louisiana's State Health Officer. [*Original Stipulation,* Exhibit II] As he articulated Louisiana's policy, that state refuses to accept milk which does not meet Louisiana standards:

> "At present we are not receiving out-of-state processed milk from Mississippi, a state of particular concern to you, because the milk does not meet our standards. . . . Again, we have no objection to importation of milk into Louisiana so long as it meets the same standards we require of intrastate producers and processors. Louisiana has not entered reciprocity agreements with any state." [*Original Stipulation,* Exhibit II]

Louisiana's policy, authoritatively articulated through Dr. Vidrine, is at war with the commerce clause. Moreover, there is no factual support for the proposition that Mississippi milk does not meet Louisiana's written standards. Dr. Vidrine has adopted the policy against reciprocal agreements despite a statutory policy in Louisiana favoring reciprocal agreements: "The State Health Officer may accept the certificate of inspection of a duly authorized government representative, agent, or agency of such other state wherein such products are produced." [Para. 5.B.1., Exhibit J, *Original Stipulation*, Chapter 5, Milk, Milk Products and Manufactured Milk Products Regulations, January 28, 1968, p. 6]

ARGUMENT

I. Reciprocity of Inspection Standards and Inspection Results As an Alternative to Extraterritorial Inspections or Excise Taxes on Producers Does Not Unconstitutionally Burden Interstate Commerce.

The regulation at issue here is plain and unequivocal:

"Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts

Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis. . . ." (Regulations Governing the Production and Sale of Milk and Milk Products, Section 11)

The regulation does not say without more that Louisiana milk is barred from export to Mississippi unless Mississippi milk can enter Louisiana. Appellant maintains in its jurisdictional statement that Part One of the regulation respecting inspection standards is constitutional while reciprocity is not. [Brief of Appellant, p. 5] Of course, the regulation is not severable for two interrelated sets of reasons.

First, the health requirements of Part One and the reciprocity requirements of Part Two are inextricably bound up with each other. §11 covenants that Mississippi will do the inspections, will certify them, and will accept a standard below that applicable to domestic producers if the forwarding state will do the same. Second, Parts One and Two are not severable because severability would allow a lesser standard of health and sanitation for domestic producers than out-of-state producers. The commerce clause does not require that Mississippi affirmatively disadvantage domestic producers in a way which might offend the Equal Protection Clause of the Fourteenth Amendment. Finally, the appellant is incorrect when he says that A & P meets all the health related requirements of the Mississippi regulation. Absent reciprocity, which Louisiana stoutly refuses to grant, the substantial equivalency standard in the regulations is *exact compliance* with Mississippi's standards for domestic producers.

A & P's milk from the Kentwood plant is, therefore, not barred by its failure to meet the health requirements of Part One of §11, but by its failure to comply with stan-

dards for domestic processors set out at p. 5, *supra*. A & P evinces a misunderstanding of this when they represent that "A & P has complied with all health related requirements of the milk regulation, within the meaning of §11." Absent on-site inspections of the Kentwood plant, which have not taken place (Testimony of Clinton Van Devender, Transcript of Testimony on Motion for Preliminary Injunction, p. 6), and Louisiana's proven shortfall in its own regulations below that of Mississippi's, A & P's milk does not meet the health requirement. Because of the nonseverability of §11, A & P cannot have its milk judged according to the relaxed standards of §11. As to the domestic standards which for nonreciprocating states become "substantial equivalency", A & P did not allege or prove compliance with these standards and is, therefore, barred by them.

These Mississippi health and safety standards, *supra*, are valid and constitutional as apply to milk originating outside the police jurisdiction of Mississippi. These regulations would not be forbidden even though they might affect interstate commerce because they are rationally related to a state's legitimate objects of regulation. *United States* v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1943). States have wide latitude in their exercise of police power over facilities for handling milk. *H. P. Hood & Sons* v. *Dumond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948). The pertinent Mississippi regulations are protective measures for the health, safety, and welfare of its citizens and may constitutionally be relied upon. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

Louisiana's failure to execute a reciprocity agreement prevents any part of §11 from being applied to Louisiana processors. The health and reciprocity features of §11

plainly interface with each other. By its failure to enter into reciprocity, Louisiana is saying that it will not on a reciprocal basis accept the valiidty of Mississippi inspections and Mississippi ratings. There is a valid health related purpose in one state conceding that a sister state is making a believable and proper health inspection of milk. The overriding health related feature of §11 is the exchange of milk upon equivalent standards which are not necessarily chosen by each state but are a compromise.

That reciprocity and substantial equivalency of regulation go hand-in-hand is self-evident. The substantial equivalency standard of §11 insures both similar standards of inspection and, of equal importance, similar execution of the inspections. Thus the substantial equivalency standard goes to the entire milk inspection procedures and *practices* utilized by a sending state. If Louisiana will not give trust and reliance to Mississippi's conduct of the inspections, then Mississippi is loath to accept the same Louisiana procedures, out of a regard for the health and welfare of her own citizens.

There is testimony that as of the November 6, 1972, date of the hearing on motion for preliminary injunction Mississippi accepted the 90 percent rating and the substantial equivalency of Louisiana regulations. But §11 imposes a continuing dual health requirement that requires ongoing supervision and continuing vigilance. "(1) The milk must be produced, pasteurized, and labeled under regulations which are substantially equivalent to this regulation, and (2) have been awarded an acceptable milk sanitation compliance rating of 90 percent or above. . . ." Failure of Louisiana to reciprocate gives rise to apprehension that continued inquiry by Mississippi authorities into the substantial equivalency of Louisiana regulations would be justified. Further, substantial equivalency and a 90%

rating are not the same thing. This is true in a context where the substantial equivalency standard runs to the entire milk inspection procedures and practices utilized by a sending state. The decision to accept the substantial equivalency of Louisiana's procedures is a pure health consideration which is made easier and more palatable where the sending state will reciprocate.

The adoption of §11 was a generous waiver of Mississippi's strict inspection requirements to facilitate trade. The effect of the provision as found by the District Court has been to lower trade barriers and create an open market for milk in the State of Mississippi. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* pp. 575-576. These findings are certainly not clearly erroneous. As to the claim that there has been an actual interference with the whole flow of interstate commerce, it clearly fails for want of proof. As this Court recently remarked in a totally different context but to similar effect, "On the record in this case, however, the conclusion of the District Court that no such circumstances existed here cannot be considered erroneous." *Gulf Oil Corp.* v. *Copp Paving Co.*, ... U.S. ....., 95 S.Ct. ....., 42 L.Ed.2d 378 (1974).

Certainly the Mississippi regulation affects commerce and with respect to Louisiana processors affects it in a substantial way. But the effect on commerce is the inverse of what the appellant says. Manifestly, the effect of the regulation has been to open free and unfettered trade in milk. While appellant says the provision favors local processors and opens foreign markets for local businessmen (Jurisdictional Statement, p. 8), the true effect of the rule is to disadvantage local processors. In point of fact, §11 aids the free flow of milk, and to this the appellant A & P agrees:

> "Reciprocity, by eliminating hypertechnical standards peculiar to one state, may aid the flow of milk." Jurisdictional Statement, p. 9.

All the authorities relied on by the appellant are inapposite. They involve trade barriers enacted with a hostile eye toward out-of-state suppliers affirmatively disadvantaging them by price, area or quantity discrimination. In *Baldwin* v. *Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1934) a challenged New York law forbade the sale of out-of-state milk unless purchased at a price which would be lawful under New York regulations. The complaining distributor had purchased his milk out of state at less than New York's established minimum. New York's authorities offered the argument that New York prices were necessary to insure a reliable supply of healthful milk. This Court rejected the lame health argument, seeing the New York price system as insulating local producers from interstate competition—in effect "an unreasonable clog upon the mobility of commerce."

The New York regulations were "hostile in conception as well as burdensome in result." 294 U.S. at 527, 79 L.Ed. 1040. Significantly, the Court observed that the degree of interference with interstate commerce whether direct or indirect was irrelevant since the *purpose* and *tendency* [emphasis supplied] of the regulations was to suppress competition between the states. Being transparently protectionist the regulations were thus outside the domain of state power.

Dean Milk Company v. *City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) sustained commerce clause objections to regional protectionism. An ordinance of Madison, Wisconsin, provided that milk sold in the city must be bottled within five miles of the center of the city.

Second, milk originating beyond a twenty five mile radius of Madison's customary inspections were likewise barred. This Court invalidated the ordinance as being an undue burden on commerce. First, the Court reasoned that the regulation wholly bars out-of-state commerce and is plainly discriminatory. Second, the Court held that valid local health interests need not be sacrificed if there were reasonable non-discriminatory alternatives available to the authorities. Among the alternatives noted were surcharges on processors for the new inspections. Mississippi's Section 11 reciprocity requirement is a more satisfactory alternative in that it satisfies local health requirements while avoiding extra charges or out-of-state inspections. *Dean Milk* further teaches that once a state recedes from a position of economic isolation with respect to its sister states it bears a lighter burden of upholding its regulations under the commerce clause.

Polar Ice Cream & C. Co. v. *Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964), further elaborated the force of the commerce clause on demonstrated trade barriers. The State of Florida had regulations which afforded local producers a preference in the sale of raw milk. To comply processors had to accept Florida produced milk at 61¢ per gallon up to prescribed quotas. If and only if the quota was met and domestic output was fully purchased could distributors sell the cheaper out-of-state milk. Against this background, this Court held that out-of-state milk was relegated to the surplus market alone. Such a scheme was said to be analogous to the New York statutes in *Baldwin*. To arguments that Polar was engaging in destructive competition, this Court answered:

> "the state may not, in the sole interest on promoting the economic welfare of its dairy farmers, insulate the Florida Milk industry from competition from other states."

This Court also looked to the total effect upon commerce. Florida's authorities argued that competition was unrestricted on the distributors' level. In footnote 11, 375 U.S. at 378, 11 L.Ed.2d at 389, the Court surveyed the volume of interstate distribution and found that Florida had the lowest volume of interstate distribution of all neighboring states. Similar inquiry into Mississippi regulation shows that thirteen out-of-state dairies freely import milk under Section 11.

The discriminatory regulations in these cases, touching price, quantity, and area discrimination, were unequivocal. A willing producer could not surmount them by meeting other standards. There was no safety valve such as the Mississippi scheme here at issue.[1] These standards are

---

1. The A & P milk produced at Kentwood, Louisiana, is technically eligible for shipment to Mississippi if it meets the health regulations applicable to domestic producers. Compliance with such standards would, of course, have to come about by means of out-of-state inspections of Louisiana dairies and processing plants by Mississippi authorities. Such inspections are not presently being conducted. Mr. Clinton Van Devender, Mississippi's Supervisor of Milk Sanitation Control, testified that he did not know whether milk processed in A & P's Kentwood plant met the State Board of Health's minimum standards for domestic producers: "We wouldn't know, because we have no cause as to whether they would or not." When asked to explain, he stated, "We haven't made any inspections of the plant or of the dairies involved in the milk supply. . . ." [p. 3, Testimony of Clinton Van Devender, Exhibit F, *Original Stipulation*]

Mr. Van Devender also explained the relationship between reciprocity and out-of-state inspections:

> "Q. And without a reciprocity agreement then you would have to make an inspection of that milk at their plant or a plant of a producer and the originating plant?
> A. Yes, sir, and the producers.
> Q. So it would necessitate your having to enforce in the other states to do those things?
> A. Yes, sir.
> Q. What is the primary purpose in having the reciprocity agreement?
> A. To prevent the necessity of going into those states and making inspections and being assured that they meet our standards." [pp. 6-7, Testimony of Clinton Van Devender, Exhibit F, *Original Stipulation*]

(Continued on following page)

justifiable in the interest of the public, and the means for their enforcement are reasonably necessary for the accomplishment of a proper purpose, namely, safe and wholesome milk. *Lawton* v. *Steel*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894).

Mississippi's milk sanitation and health requirements for domestic producers were and are applicable to out-of-state processors without a §11 reciprocity agreement. The milk produced by the Great A & P Tea Company of Louisiana falls short of those requirements. Had §11 never been passed, the State of Mississippi could, in conformity with the commerce clause of the Constitution, take whatever steps were necessary to enforce these exacting requirements. Mississippi could levy a non-discriminatory excise tax upon out-of-state producers sufficient to defray the cost of additional inspections for trans-shipped milk. It could also require that on-site out-of-state inspections be conducted by its own inspectors as a prerequisite to entry to Mississippi markets. *Dixie Dairy Co.* v. *City of Chicago*, 355 Supp. 1351 (N.D. Ill., 1973).

Footnote Continued—

A & P has not alleged or proved that the milk at the Kentwood plant meets all standards applicable to domestic producers. While one might draw the inference from the supplemental stipulation that such might be the case, the important point is that without reciprocity, Mississippi must make the determination of qualification itself, just as it does for domestic dairies. Acceptance of reciprocal inspections and inspection standards allows Mississippi to credit both what Louisiana officials and the U. S. Department of Public Health report about the Kentwood plant instead of making continuing on-site inspections.

Without on-site Mississippi inspections and absent proof that Louisiana's milk meets Mississippi's domestic standards, the primary hurdle which A & P must cross is the more stringent standards of the State of Mississippi. This could come about only by the requisite inspections in Louisiana by Mississippi officials. Mr. Van Devender's testimony indicates that expense would be the primary factor inhibiting such out-of-state inspections. Of course, Louisiana would have to permit such inspections, as would the producer involved.

Both these devices, reasonably applied, would not offend the commerce clause. As a third alternative, Mississippi has opted for a reciprocal inspection system which obviates the financial burden of inspections or taxes. If the State of Mississippi could do the former it seems on principle entirely valid that she do the latter.

Appellants treat this matter as if the effect of §11 on them proves *per se* a commerce clause violation. This proves vastly too much. Viable regulations like §11 must have some sanctions. Appellant A & P focuses sharply on its plight without appreciating the intended and actual effect of §11—the widest possible free trade consistent with preservation of local health and safety interests.

This Court's leading cases on self-executing effect of the commerce clause, *Parker* v. *Brown*, 317 U.S. 341, 633 S.Ct. 307, 87 L.Ed. 315 (1943); *Southern Pacific Company* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *South Carolina Highway Department* v. *Barnwell*, 303 U.S. 177, 58 S.Ct. 510, 83 L.Ed. 1124 (1938), all take an empirical view of challenged regulations. These decisions analyze the rationale for the regulation, its actual effect, and its effects on interstate commerce both on the parties and those similarly affected. The commerce clause as seen through these decisions, mandates an appraisal and accommodation of the competing demands of state and national interest involved, not total erosion of state regulation of commerce.

A & P asks this Court to void a statutory regulation producing pure free trade merely because of Louisiana's actions, not because of anything the State of Mississippi has done. This is redress against the wrong party for the wrong reasons. Given the relevant facts and circum-

stances: (1) widely different state regulations governing all the minutiae of milk production, (2) the cumbersome nature and expense of out-of-state inspections, (3) lack of central facilities to inspect out-of-state milk while in transport, Mississippi's policies appear in a more favorable light. That the regulation is coercive on participating states is a testament to its effectiveness. If §11 were voluntary it would produce no meaningful increase in interstate trade in milk. Therefore the crucial question is whether §11's effectiveness in fulfilling permissible state purposes is outweighed by a corresponding impediment to interstate commerce, Id. at 325 U.S. 775, 776. Here the balance is doubly struck in favor of the state regulation. By the least expensive and least disruptive method, §11 has produced an impressive volume of interstate movement of processed milk.

Further there is strong economic justification for §11. As a leading commentator has observed:

> "How overreaching must a state measure to merit condemnation as discriminatory . . . Discrimination exists or not depending upon whether there is an economic justification for the difference in treatment which the state accords interstate commerce." Noel T. Dowling, "Interstate Commerce and State Power—Revised Version," *Selected Essays on Constitutional Law*, 1938-1962, 280, 290.

Of course our obvious and repeated theme is that §11 has generated a wide free trade area in milk. As a consequence §11 has produced an attendant freedom from state government regulation as milk moves interstate. Bypassing of each state's inspection machinery removes a large hidden cost of milk production. Under §11 producers obviously may skirt potential excise taxes, inspection fees,

as well as delivery delays and resultant risk of spoilage. Finally, all producers benefit economically by saving production cost increases required to meet more stringent out-of-state standards. Also conserved is any effort to produce milk in the same plant according to different states' standards.

Section 11 clearly meets the balancing test this Court has ordained in commerce cases. The burden imposed by §11 is clearly not excessive in relation to the putative local interests. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). Where §11 clearly produces far-ranging free trade in milk with respect to other sister states, this Court cannot say that the regulation serves provincial local interests. The focus clearly should be on interstate commerce in milk through Mississippi with respect to all sister states and not the business interests of the Great A & P Tea Company of Louisiana, which set up its Kentwood processing facility in either disregard of or ignorance of applicable Mississippi regulations.

Mississippi's §11 regulation is a reasonably nondiscriminatory alternative to barriers that would result from application from Mississippi's own domestic requirements to foreign producers. There is no purer example of such barriers than Dr. Vidrine's explanation of Louisiana's trade barrier in milk. §11 is a proper regulatory bypass of strict adherence by each state to its own exacting standards. In exactly the way envisioned by *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), Mississippi has opted for accepting substantially equivalent regulations of a sister state rather than charging the actual and reasonable cost of out-of-state inspections to importing producers. *Dean Milk, supra*, approved this approach, and Mississippi has accepted the invitation with the proviso the

forwarding state accept Mississippi ratings and equality of Mississippi's regulations.

The additional requirement of reciprocity is consistent with *Dean Milk* and its family of cases. The practical effect of Mississippi's regulation is one which satisfies this Court's standards for a justifiable indirect burden upon commerce. First, Mississippi has opened its borders by its policies and has not "placed itself in a position of economic isolation." *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct 497, 79 L.Ed. 1032. Second, in dealing with a commodity like milk, Mississippi has conditioned importation upon "fitting standards of sanitation. . . ." Those fitting standards are to waive its own strict requirements and replace them with a regime under which believable sister state inspections and inspection ratings up to 90 percent of the federal standard are enough if the forwarding state will agree to reciprocate.

Reciprocity, as conceived and operated by Mississippi health authorities, preserves both free trade in milk and protection of the health and safety of the state's inhabitants. Through reciprocity a minimum of indirect interference with interstate commerce results. As in the case of Louisiana, Mississippi's policy only results in an obstruction of trade where a sister state adopts avowedly nonstatutory and unconstitutional policies to protect local dairies. While Louisiana is not a party defendant, this Court cannot overlook Louisiana's stubborn policies as Court balances the effect upon all commerce.

With mutual exchanges of standards of inspection under §11, Mississippi does not appreciably burden interstate trade. Such incidental or indirect burden as that which afflicts A & P, *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752, does not

appreciably burden interstate trade. Interstate commerce in milk is a two-way street. Mississippi's regulations presuppose that foreign states will accept her milk, and §11 provides a basis for that acceptance.

Mississippi's policy cannot be judged by the interruption which a foreign state's recalcitrance produces. In other words, but for Louisiana's policy, Mississippi's regulation would serve valid health purposes and valid relaxed regulatory requirements. But Louisiana's obstinate policies jam the interstate machinery.

Appellant argues access to interstate commerce cannot be conditioned upon the action of some other state. This Court's authority is to the contrary. In *Mintz* v. *Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245 (1933), the State of New York required that every interstate shipment of livestock be accompanied by a certificate from the sending state's chief sanitary officer that the cattle and their herds were free from Bangs disease. The Court held that the order was an appropriate inspection measure to prevent further spread of disease. This Court implicitly ruled that the rights of private parties might hinge upon the actions or inaction of government bodies. Of course, A & P could have had redress in the State or Federal Courts against Louisiana officials both for commerce clause reasons as well as grounds under the applicable Louisiana health statutes. If A & P is being prejudiced by the actions of Louisiana health officials it should direct its complaints there.

II. This Court Lacks 28 USC §1253 Jurisdiction of the Appeal Concerning Those Out-of-State Processors Who Were Grandfathered in When §11 Was Adopted; the Order Appealed From, Properly Considered, Does Not Deny an Injunction Concerning a Specific State Statute or Regulation Concerning Grandfathered Dairies; Alternatively, There Is No Jurisdiction Because A & P Has No Standing to Challenge the Shipping of Milk by Other Out-of-State Dairies.

The presence of any issue concerning access to Mississippi markets by other out-of-state processors is a mystery. The original complaint for a declaratory judgment and injunctive relief does not raise the issue. No amended pleading does so. The grandfather clause treatment did not relate to §11, the only statute or regulation under attack. No relief was asked concerning any previous statute or regulation in existence before §11 which might have provided authority for other dairies to enter, nor was any such statute adduced by appellant. Yet, A & P in the "Questions Presented" portion of its jurisdictional statement states as follows:

> "A related question is whether Mississippi enforcement policy, allowing certain Louisiana milk processors to export into Mississippi but denying that right to A & P unconstitutionally deprives A & P of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution." [Jurisdictional Statement, p. 4]

This issue was injected into the case quite by accident. At the hearing on motion for preliminary injunction on November 6, 1972, counsel for the appellee Dr. Cottrell introduced a document showing those dairies who were shipping under §11 reciprocal agreements. [Exhibit F, p.

10, *Original Stipulation*] The document containing this information also showed that four dairies in Louisiana and two in Alabama were grandfathered into the state at the time §11 was adopted. A & P did not further explore the issue.

One year elapsed between the November 6, 1972, hearing and the hearing on merits. A & P, having learned of the access to Mississippi by other Louisiana dairies, filed no amended pleading and undertook no further discovery. In fact, it is quite clear that the only use A & P made of these grandfather clause regulations was to argue in the Trial Court, as they did in their jurisdictional statement (Jurisdictional Statement, p. 5) that A & P met all the health related requirements Mississippi imposed because certain other out-of-state dairies which were not inspected could ship into Mississippi. Of course, this reasoning pales before the explanation that A & P is barred not by the §11 health standards but by the standards applicable to domestic producers. *Supra*, p. 5. But as far as the pleadings, testimony, and stipulations are concerned, there is no factual development by A & P of the policies and practices underlying these grandfather regulations or their source in state law.

A & P has not sought to learn under what regulations or policies the grandfathered in dairies who have shipped into Mississippi before 1967 were continued. That, of course, bears materially upon whether they have sought an injunction against a state statute or regulation of state-wide import by reason of its unconstitutionality or whether such an injunction has been denied under 28 USC §2281. The only record fact which even tangentially bears upon the grandfather regulations is that no inspections are presently conducted outside Mississippi. It does not appear of record

what health standards are applied to these grandfathered in dairies, or under what regulation they were admitted. There is no record on whether any reciprocal arrangements were a part of these grandfather clause regulations. As to Louisiana, it is clear that reciprocity was no part of the grandfathered in dairies since Mississippi processed milk cannot enter Louisiana. (Testimony of Clinton Van Devender, p. 7, Exhibit F, *Original Stipulation*) Finally, it is not shown that access under the grandfather clause is necessarily statewide access. In other words, the grandfathered regulations may have granted access to certain counties, not the whole state.

On this state of facts, the District Court treated the incipient claim against the grandfather clause regulations as a substantive claim for relief. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* p. 576. The Court held the rule did not violate equal protection. Conceding that the reciprocal agreement feature of §11 was valid, the court felt enjoining it because of the grandfather clause regulations would have barred the imposition of a valid reciprocity policy at any time in the future to any dairies in states where some dairies had been grandfathered in. A & P simply could not have through the back door what it could not obtain through the front.

At a minimum this Court lacks jurisdiction of the appeal over the issue of grandfather clause regulations. Whether this is a 28 USC §1253 appeal depends, in turn, on whether a Three Judge Court was properly convoked to hear that issue. *Moody* v. *Flowers,* 387 U.S. 97, 87 S.Ct.

1544, 18 L.Ed.2d 643 (1967).[2] At the outset the equal protection claim concerning the grandfather clause regulations was not properly before the Three Judge Court. It was clear that the grandfather clause processors did not enter the state by virtue of or under the auspices of §11. A different and previous regulation or policy was the source. This is clear from the very language of §11. No statute or regulation embodying the grandfather clause policy was before the Court. Given the void in the evidence concerning the source or application of the grandfather clause regulations sustaining a §1253 appeal concerning it would be to take jurisdiction where none affirmatively appears.

One cannot tell from the pleadings, the opinion of the Court, or the jurisdictional statement exactly the relief A & P wants concerning the grandfather clause. If they are attacking the grandfather clause policy it would appear that an injunction would merely bar enforcement of that policy further. This would strip the grandfathered in dairies of their access but would not affirmatively benefit A & P. In that posture any jurisdiction of such a claim

---

2.

§2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

would fail, since A & P has no direct interest in merely disadvantaging its competitors without obtaining any affirmative benefit for itself. *Golden* v. *Zwickler*, 394 U.S. 103, 110, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). Couched in that way the requested relief would not obtain any protection for A & P against actual interference with their rights. *United Public Workers of America* v. *Mitchum*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). If proscription of the grandfather policy is at issue, A & P is clearly before this Court urging someone else's lawsuit. To take access by means of interstate commerce away from competitors places A & P in the position of urging less constitutional protection for everyone. It does not undo allegedly unconstitutional conduct with respect to A & P.

To the contrary, if A & P is suggesting that it is entitled to a mandatory injunction to obtain entry for her milk because of the claimed equal protection violation as to the grandfathered dairies theory, then it is not challenging §11 as to constitutionality. §11 says not a word about grandfathered dairies. Such dairies as were grandfathered were continued in existence under predecessor regulations, not §11. Hence, there is no Three Judge case. *Public Service Commission* v. *Wycoff*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952); *Bailey* v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962).

A Three Judge case and a proper §1253 appeal also are lacking on A & P's assertion that the grandfather treatment is nonstatutory and therefore ultra vires. At page 12 of the Jurisdictional Statement, A & P says "At no time has Mississippi proffered any state legislative act to permit such grandfather treatment." This says that the policy is followed without statutory approval and, therefore, the attack on it cannot be a challenge to the constitutionality of a state statute. Note that the appellant does not say that

the grandfather regulation takes place under a state legislative enactment but rather exceeds any statutory authority. *Frasier* v. *Board of Trustees of University of North Carolina*, (D.C. of N.C., 1955) 134 F.Supp. 589, aff'd without op. 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956). A & P affirmatively says that there is no such statute. Therefore, A & P's claim against the grandfather policy does not attack a state statute or policy thereunder. *Phillips* v. *U. S.*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *Moody* v. *Flowers, supra.*

The order denying A & P relief on its equal protection claim is not an order denying an injunction against a state statute. A & P did not seek an injunction against the enforcement of the grandfather policy so much as they appear to be asking the Court, for the first time on the appellate level, to mandamus the state authorities to grant A & P the same privileges as the grandfathered in dairies. Since a prohibitory injunction would not have availed A & P of any benefits, the Three Judge Court's resulting decision against A & P is in the nature of a declaratory judgment. A & P did include in its original prayer for relief a prayer for a declaratory judgment that Mississippi's policy under §11 violated the commerce clause.

On the extravagant assumption that this Court might treat the grandfather policy as intrinsically related and ancillary to the Three Judge issue, the District Court's holding on the equal protection question is in the nature of a declaratory judgment which is not directly appealable pursuant to §1253. *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970). Since a favorable decision for A & P on the equal protection claim could not have granted them access to Mississippi markets, by the same token the District Court's unfavor-

able ruling did not deny them coercive relief. This makes the matter nonappealable under 28 USC §1253.

Finally, there is no warrant for considering the equal protection claim, as pendent to the §11 claim. *Perez* v. *Ledesma*, 401 U.S. 87, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971). The equal protection claim turns on different facts, questions different regulations, though they are not identified, and does not require relief of a constitutional nature. There are clearly two claims—one against the enforcement of §11 turning on a constitutional challenge grounded in the commerce clause and another against pre-§11 grandfather treatment for dairies importing milk as of the date §11 was adopted. The relief as to the §11 claim would strike down enforcement of a state policy; relief on the equal protection claim if it were to be effective relief, would mandatorily add to a pre-existing state policy. As *Ledesma* ruled, "Even where a Three Judge Court is convened to consider one controversy between two parties, the parties are not necessarily entitled to a Three Judge Court and a direct appeal on other controversies which may exist between them." *Perez, supra*, 401 U.S. at 87, 88, 27 L.Ed.2d at 706.

CONCLUSION

§11 of Mississippi's milk regulations enhance the flow of interstate traffic in milk through Mississippi. The effect of a comprehensive reciprocity provision such as §11 should not be judged solely by whether the most economically isolated states cooperate with it. The State of Louisiana is by the plain admission of its state health officer [Original Stipulation, Exhibit 2] barring free trade in processed milk without any justification whatsoever. Should this case be reversed, this Court's ruling will not

budge Louisiana and its officials from their obstructionist policies. By the same token, a reversal might invite those states extending reciprocal provisions to out of state dairies to abandon those policies in favor of license fees or strict enforcement of domestic regulations.

Therefore, this judgment of the District Court should be affirmed for the following reasons:

1. The admittedly unconstitutional policy of the State of Louisiana is really the clog upon the interstate shipment of milk in this case.

2. An overview of the application of Mississippi's policies shows they were enacted to further and have actually furthered the broadest possible free trade in milk.

3. The barrier inflicted upon Louisiana milk is necessary to implement the free trade policies of §11 since all participating states must simultaneously make good faith undertakings to create free trade in milk.

4. Such barrier as results for producers in Louisiana results from the imposition of valid health and safety requirements of the State of Mississippi, which apply when no reciprocity agreement is in force.

This Court lacks jurisdiction to hear A & P's claim that it is denied equal protection of the laws by access to the Mississippi milk market of certain processors enjoying grandfather clause exemptions from §11. Regardless of the merit of such claim, Section 1253 jurisdiction is strictly construed. Upon this premise, A & P cannot raise in this Court, under Section 1253, the validity of grandfather clause policies since it has neither pled nor proven the source of such policies in state law. Nor has A & P asked for an injunction within the contemplation of Section 1253. The

equal protection claim, if there be one stated, belongs in the Court of Appeals.

Appellee submits that the judgment of the District Court denying all relief should be affirmed.

Respectfully submitted,

A. F. SUMMER
Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

By: HEBER LADNER, JR.